Supreme Court, U.S.
FILED

001924 JUN 26 2001

OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

B.J.M.,

Petitioner,

v.

FAMILY OPTIONS; E.R.B. AND P.L.B., his wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

HAROLD J. CASSIDY
Counsel of Record
961 Holmdel Road
Holmdel, NJ 07733
(732) 332-9300

ROBERT W. GOODMAN
50 Main Street
Hackensack, NJ 07601
(201) 488-7100

JOSEPH E. MARLEY
66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 422-1771

Attorneys for Petitioner

167232

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

14+1 pp

QUESTIONS PRESENTED

In New Jersey a mother's constitutionally protected fundamental liberty interest in her relationship with her infant can be terminated only after a judicial trial or proceeding, findings of fact made by the judge, and entry of a judicial decree which formally terminates the mother's constitutionally protected liberty interests. Under the New Jersey statutes the parties seeking to adopt the mother's child must set forth and prove grounds for the termination of the mother's rights. The order of termination must be entered in the adoption proceeding for a Judgment of Adoption to be entered.

Petitioner, B.J.M., who gave custody of her daughter to an agency under severe duress, immediately demanded the return of her child. When the agency refused to comply with her request, petitioner immediately asserted her right to maintain her relationship with her child by filing a complaint seeking the return of her baby. Following a plenary trial, B.J.M.'s rights were terminated against her will by the trial court. The trial court (affirmed with full opinion by the Appellate Division) refused to apply the standard of proof dictated by the due process clause of the Fourteenth Amendment as set forth in *Santosky v. Kraemer,* 455 U.S. 745 (1982), only because it was alleged that the mother had given a voluntary, informed, knowing waiver of her constitutional rights, and because the New Jersey statutes rigidly forbid the revocation of a waiver once made, even if termination of the mother's rights is not in the best interests of the child and the mother.

1. Is it a violation of due process for the state of New Jersey to terminate a mother's fundamental liberty interest in her relationship with her child over her strenuous objection without imposing the clear and convincing evidence standard of proof upon the proponent of the

termination, as directed by this Court in *Santosky v. Kraemer,* 455 U.S. 745 (1982), merely because of the nature of the alleged factual basis for the termination — that the mother, on an earlier date, made a voluntary and informed waiver of her fundamental rights?

2. Is it a violation of due process for the state of New Jersey to refuse to apply the standard of proof set forth in *Santosky v. Kraemer,* 455 U.S. 745 (1982), when the parties seeking termination of the mother's parental rights is a private adopting couple or a private adoption agency rather than the state, contrary to *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)?

3. Is it a violation of the mother's due process rights for the state to terminate her fundamental liberty interest in her relationship with her child, over her clear objection, without clear and convincing proof that the mother's alleged waiver of her substantive constitutional rights was truly voluntary, informed and knowing?

4. Is it a violation of the mother's due process rights for the state to forbid a timely and immediate revocation of a waiver of her parental rights where the revocation is not shown to be contrary to the best interests of her child; where the child's interests would in fact be advanced by recognition of the revocation; and where there is no compelling state interest to justify termination of the mother's rights?

PARTIES TO THE PROCEEDING

The caption of the case, as it appears on the cover of this petition, contains the names of all of the parties to the proceedings in the Appellate Division of the Superior Court of New Jersey. The individual parties are listed by their initials only, pursuant to state practice. The full names of all parties appear in the transcripts.

Petitioner is **B.J.M.**, the mother of an infant daughter born on January 11, 2000 when B.J.M. was a nineteen year old college sophomore. B.J.M., without adequate counseling required by New Jersey law, and counseling adequate to assist her in reaching an informed decision, signed a document purporting to surrender her daughter on January 21, 2000. She immediately requested the return of her child, and after her request was denied, petitioner instituted suit for the return of her child on February 14, 2000.

The respondent, **Family Options**, is a licensed adoption agency which had the legal duty under New Jersey law to counsel the petitioner on every option available to her to explore all means by which B.J.M. could keep her baby. The record in this case reveals that Family Options treated adoption as the first and preferable option and was financially compensated for their time by the prospective adoptive parents. Thus, the agency's pecuniary interests conflicted with its legal duty to petitioner.

Respondents **E.R.B.** and **P.L.B.** are a married couple who had been identified by Family Options as potential adoptive parents for B.J.M.'s daughter. Family Options placed the child in their custody prior to petitioner instituting suit for the return of her child.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	iii
Table of Contents	iv
Table of Cited Authorities	vi
Table of Appendices	xii
Decisions Below Orders and Opinions	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. The Nature of the Action and Procedural History	2
B. Statement of Facts	6
Reasons for Granting the Writ	10
Introduction: New Jersey's Adoption And Termination Statutory Scheme	12
I. The Decision Of The Appellate Division Of The Superior Court Of New Jersey Directly Conflicts With Controlling Decisions Of This Court In *Santosky v. Kraemer* And *M.L.B. v. S.L.J.*	17

Contents

		Page
A.	The Substantive Right	17
B.	New Jersey Can Not Avoid the Requirements of Procedural and Substantive Due Process Merely Because a State Agency is Not Party to This Action	19
C.	New Jersey's Failure to Require the Proponents of Termination in This Case to Prove the Basis of Termination by Clear and Convincing Evidence is in Conflict with *Santosky v. Kraemer* ...	21
II.	This Case Presents Important Constitutional Questions That This Court Has Never Directly Addressed But Should Decide	23
III.	There Is An Apparent Conflict Between The Decision Of The New Jersey Courts In This Case And Those Of At Least Two Other States Which Impose The *Santosky* Standard Of Proof In Non State Agency Waiver Cases	28
Conclusion		29

TABLE OF CITED AUTHORITIES

Page

Cases:

Brady v. U.S., 397 U.S. 742 (1970) 25

Clark v. Jeter, 486 U.S. 456 (1988) 26

D.S. v. T.D.K., 499 N.W.2d 558 (N.D. 1993) 21

D.Y.F.S. v. A.W., 512 A.2d 438 (1986) 25

Flagg Bros. Ins. v. Brooks, 426 U.S. 149 (1978) .. 21

G.A.H. v. R.L.A., 712 So. 2d 4 (Fla. 1998) 21

In re Adoption by J.J.P., 175 N.J. Super 420 (App. Div. 1980) 14

In re Adoption of Children by D., 61 N.J. 89 (1972) 12

In re Jay [R.], 150 Cal. App. 3d 251, 195 Cal Rptr 672 (1983) 21

In re K.L.J., 813 P. 2d 276 (Alaska 1991) 21

In re N, 96 N.J. Super. 415 (App. Div. 1967) 19

In re R.J.C., 300 So. 2d 54 (Fla. 1st Dist. Ct. App. 1974) 21

In the Matter of a Female Child, 938 P. 2d 1184 (HI 1997) 28

Cited Authorities

Page

In the Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988) 10, 12, 13, 14, 15, 19, 20, 23, 25, 26

Johnson v. Zerbst, 304 U.S. 458 (1938) 22, 24, 25

Lehr v. Robertson, 463 U.S. 248 (1983) 18, 19

Loving v. Virginia, 388 U.S. 1 (1967) 26

Meyer v. Nebraska, 262 U.S. 390 (1922) 17

Meza v. Rodriguez, 305 Del App. 3d 777 (1999) .. 28

M.L.B. v. S.L.J., 519 U.S. 102 (1996) .....
.....ii, 10, 11, 12, 14, 17, 19, 20

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 18

N.J. D.Y.F.S. v. A.W., 103 N.J. 591 (1986) 12, 13

Parham v. J.R., 422 U.S. 584 (1979) 19

Pickett v. Brown, 462 U.S. 1 (1983) 26

Santosky v. Kraemer, 455 U.S. 745 (1982) .....
..... i, ii, 4, 10, 11, 17, 19, 21, 23, 28

Sees v. Baber, 74 N.J. 201, 377 A.2d 628 (1977) .. 14, 27

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 18, 26, 27

Cited Authorities

Page

Swayne v. L.D.S. Soc. Servs., 795 P. 2d 637 (Utah 1990) 21

Troxel v. Granville, 2000 WL712807 (2000) 18, 19

Wilke v. Culp, 196 N.J. Super. 487 (App. Div. 1984), *cert. den.*, 99 N.J. 243 (1985) 14

William D. v. Shawna Renee A., 1999 N.L. 1188850 (W. Va.) 28

Zablocki v. Redhail, 434 U.S. 374 (1978) 26

United States Constitution:

U.S. Const., Amend. XIV ..... *passim*

Statutes:

28 U.S.C. § 1257(a) 1

N.J.A.C. 10:121A *et seq.* 15

N.J.A.C. 10:121A-1.6 15

N.J.A.C. 10:121A-5.4 16

N.J.S.A. 9:2-16 ..... 1, 13, 15

N.J.S.A. 9:2-17 ..... 1, 13, 15

N.J.S.A. 9:2-18 ..... 1, 13, 15

N.J.S.A. 9:2-19 ..... 1, 13, 15

Cited Authorities

	Page
N.J.S.A. 9:2-20	1, 13, 15
N.J.S.A. 9:3-39.1(b)	15
N.J.S.A. 9:3-39.1(c)	15
N.J.S.A. 9:3-40	15
N.J.S.A. 9:3-41	14
N.J.S.A. 9:3-41 to 50	1
N.J.S.A. 9:3-41.1	14
N.J.S.A. 9:3-41(a)	15
N.J.S.A. 9:3-41(b)	15
N.J.S.A. 9:3-41(d)	15
N.J.S.A. 9:3-42	14
N.J.S.A. 9:3-45	14
N.J.S.A. 9:3-45.1	14, 15
N.J.S.A. 9:3-45b(1)	14
N.J.S.A. 9:3-46	3, 14
N.J.S.A. 9:3-46(a)	12
N.J.S.A. 9:3-47	14

Cited Authorities

Page

N.J.S.A. 9:3-47(c) 3, 12

N.J.S.A. 9:3-50 ..... 12, 14, 15

N.J.S.A. 30:4c-15 to 30:4c-15.4 ..... 1, 13

N.J.S.A. 30:4c-23 ..... 1, 13

Rules:

U.S. Supreme Court Rule 10(b) 10

U.S. Supreme Court Rule 10(c) 10

U.S. Supreme Court Rule 14(1)(f) 1

U.S. Supreme Court Rule 29.4(c) 1

Other Authorities:

2 Am. Jur. 2d Adoption § 1104 27

1&2 J. Bowldy, *Attachment of Loss* (1969, 1973) ... 18

Leister, *Psychological Effects of Motherhood* 76 (1980) 18

Lumely, *Attitudes to the Fetus Among Primagravidae*, J. Australian Pediatric 106 (1982) 18

Cited Authorities

Page

M. Mahler, *The Psychological Birth of the Human Infant* (1975)). To this list of authorities we may add the following: Klaus and Kennel, *The Family During Pregnancy,* in Parent and Infant Bonding, 1 (1982) 18

Sugarman, *Parental Influences in Maternal Infant Attachment*, 47 Am. J. Orthopsychiatry (1977) ... 18

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The Superior Court Of New Jersey, Appellate Division Dated, Decided And Filed January 9, 2001 ..... 1a

Appendix B — Opinion Of The Superior Court Of New Jersey, Family Division, Union County Dated, Decided And Filed April 18, 2000 ..... 22a

Appendix C — Order Of The Superior Court Of New Jersey, Chancery Division, Family Part, Union County Dated And Filed April 18, 2000 ..... 95a

Appendix D — Order Of The Supreme Court Of New Jersey Denying Petition For Certification Dated March 26, 2001 And Filed March 28, 2001 .... 97a

Appendix E — Relevant Statutes 99a

Petitioner B.J.M. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Appellate Division of the Superior Court of New Jersey.

DECISIONS BELOW
ORDERS AND OPINIONS

The Supreme Court of New Jersey denied petitioner's application for certification by order dated March 26, 2001 and filed March 28, 2001 (App., A97-98). The Appellate Division of the Superior Court of New Jersey decided and filed an opinion in this case on January 9, 2001 (App., A1-A21) affirming the order of the Chancery Division of the Superior Court of New Jersey which filed an opinion (App., A22-94), and order (App., A95-96), both dated and filed April 18, 2000, dismissing the plaintiff's complaint which sought, among other relief, the return of her daughter. The order of the Chancery Division resulted in the subsequent order terminating petitioner's constitutional rights.

STATEMENT OF JURISDICTION

Petitioner seeks a writ of Certiorari to review the final order of the Appellate Division of the Superior Court of New Jersey entered January 9, 2001. The Supreme Court of New Jersey denied review on March 28, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a). Because the Constitutionality of a State Statute is drawn into question, the notification required by Rule 29.4(c) has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the due process clause of the Fourteenth Amendment, U.S. Const., Amend. XIV, § 1, and involves New Jersey's adoption statutes N.J.S.A. 9:3-41 to 50, N.J.S.A. 9:2-16 to 9:2-20, N.J.S.A. 30:4c-23, and N.J.S.A. 30:4c-15 to 30:4c-15.4, verbatim provisions of the most relevant state statutes are set forth in the appendix beginning at 99a as required by U.S. Supreme Court Rule 14(1)(f).

STATEMENT OF THE CASE

This case involves the termination of the fundamental liberty interest of the petitioner, B.J.M., in her relationship with her child. Her parental rights have been terminated against her will without any showing that she is and will continue to be anything other than a good mother to her infant daughter (referred to by the trial court as "Baby A"). The entire basis for the termination of B.J.M.'s rights was the assertion that she had waived her rights by signing a document surrendering her rights to a licensed adoption agency, respondent Family Options, despite the fact that the petitioner clearly and strenuously asserted her rights and sought the return of her daughter. Despite the fact that the termination was involuntary and came long after B.J.M. filed this action seeking the return of her daughter, at no time did the New Jersey courts require Family Options, as the proponent of termination, to prove the alleged basis for termination. Family Options, which refused to honor petitioner's request to return B.J. M.'s daughter to petitioner, merely alleged that the petitioner had made a legally binding waiver of her constitutionally protected liberty interests. Family Options took the further position, adopted by the state court in this case, that once made, such a waiver is not revocable, and that Family Options is not required to prove that the waiver was voluntary, informed, knowing, and obtained only after full compliance with New Jersey law which requires full counseling about all options for petitioner other than waiver.

A. The Nature of the Action and Procedural History

This case was commenced on February 14, 2000 by the petitioner B.J.M. seeking the return of her child, Baby A. *See* trial court opinion, (hereafter referred to as "Tr. Opin." at A23). Baby A was born thirty four days earlier on January 11, 2000. The surrender document relied upon by the respondents was signed on January 21, 2000. Petitioner maintains that if the proper burden of proof was imposed on the proponent of the termination, the record in this case would clearly support the

conclusion that the surrender was not informed or truly voluntary. Once B.J.M. gave the surrender documents to Family Options on January 21, 2000, petitioner immediately wanted the return of her child. Beginning on January 24, 2000 her mother started to look for a lawyer to help her get her baby back. On February 4, 2000 petitioners newly retained attorney demanded the return of the child. This action commenced ten days later on February 24 only after Family Options refused to comply with petitioner's request. (*See* Opinion of Appellate Division (hereafter "A.D. Opin.") at A1 to A6).

On February 14, 2000 the Chancery Division of the Superior Court entered an order to show cause which provided B.J.M. temporary visitation with Baby A on a daily basis not to exceed three hours each day. That visitation schedule was amended by the order of the court dated February 25, 2000 which fixed B.J.M.'s visitations on Tuesdays, Thursdays and Saturdays from 10:00 AM to 3:30 PM. By a subsequent order dated March 7, 2000 the visitation schedule was again changed to Saturdays from 10:00 AM to 4:00 PM. and Tuesdays from 5:00 PM to 8:00 PM. *See* Tr. Opin. at A23 to A25. The trial in this case commenced on March 27, 2000 at a time when the infant was only two and a half months old and the child had substantial and continual contact and nurturing with the child's natural mother. The trial lasted thirteen days and concluded on April 17, 2000. *See* Tr. Opin. at A26.

The court's determination in the present case that a constitutional waiver was validly made is the basis for the termination of the mother's rights. The court's entry of that order as a result of the procedure diligently and timely instituted by the petitioner, B.J.M., has the exact same effect as if the trial was conducted under N.J.S.A. 9:3-47(c) and 9:3-46 (involuntary termination based upon unfitness of mother). The trial court recognized this reality when the trial judge wrote:

> All inquiries that bear on whether parental rights may be terminated must be considered in light of

> the extraordinarily strong protection that surround those rights. The right . . . of the parent . . . is fundamental and constitutionally protected. See, *Matter of the Adoption of a Child by D.M.H. and S.H.*, 135 N.J. 473, 480 (1994). *Therefore, before a biological parent's rights will be terminated, strict standards must be satisfied.*

See Tr. Opin. at A36 (emphasis added).

Even prior to the commencement of the suit petitioner and her counsel argued in legal briefs submitted to the court that the burden of proof had to be carried by the proponent of the termination and that the clear and convincing standard of proof had to be employed. The trial court, although he recognized that if he ruled against the petitioner her constitutional rights would be terminated, held that the *Santosky v. Kraemer* standard did not apply and refused to require the respondents to prove the basis for the termination by clear and convincing evidence. *See* Tr. Opin. at A37, n.3 (referencing *Santosky v. Kraemer*). Although it seems rather clear that it can be inferred that case law in three other states which imposed the clear and convincing evidence standard, cited by the trial court, did impose that standard because of this Court's holding in *Santosky*, the trial court refused to impose the *Santosky* standard because he found that there was no express "guidance as to the reasons for its use of the clear and convincing standard". Tr. Opin. at A37, n.3. It may be inferred from the nature and tone of the trial court's opinion that the New Jersey courts will not adhere to *Santosky* as other states have done in the context where the alleged basis for termination is an informed voluntary waiver unless this Court specifically directs the states to do so.

From the beginning the petitioner raised in her legal arguments submitted to the trial court that the respondents did not comply with state regulations designed to insure that the waiver of her rights were informed, knowing and voluntary. The trial judge insisted that the burden of proof had to be carried

by the child's mother, not the proponents of termination, and it was she who had to prove that there was no valid, voluntary informed waiver of her rights. Ruling against petitioner, the trial court issued an opinion and entered an order dated April 18, 2000 dismissing the plaintiff's complaint.

The petitioner filed a timely appeal in the Appellate Division of the Superior Court of New Jersey. All of the issues presented in this petition were raised in the plaintiff's brief filed with that court. The petitioner argued before that court that

> it was a violation of the plaintiff's due process liberty interests for the state to enter an order in a judicial state proceeding determining the factual basis for the termination of the plaintiff's rights without imposing upon the proponent of the termination the burden of proving the basis for termination by clear and convincing evidence.

(Petitioner's Appellate Brief (hereafter P.A.B.) at p. 54; also, P.A.B. 54-61). The plaintiff argued that every aspect of the statutory process is subject to the requirements of due process because the termination process constitutes state action. *See* P.A.B. at 56. It was made clear in petitioner's brief and at oral argument that the clear and convincing burden of proof standard must be imposed upon the proponents of the termination whether the proofs pertained to the state statutory grounds or the minimum constitutional standards governing waiver of a federal constitutional right under federal law. P.A.B. at p. 53 to p. 65.

The petitioner argued before the Appellate Division, in her brief, and at oral argument that New Jersey law which makes the revocation of a waiver irrevocable regardless of the best interests of the child, is violative of due process as it was applied in this case. P.A.B., pp. 61-65.

The Appellate Division Ruled against the petitioner on all issues and entered an opinion affirming the judgment of the

Chancery Division dated January 9, 2001. That court addressed the constitutional arguments. *See* A.P. Opin. at A17 to A21. B.J.M. filed a timely petition for certification with the New Jersey Supreme Court which denied the petition by order entered March 28, 2001. This petition was thereafter timely filed.

B. Statement of Facts

Had the trial court employed the proper standard of proof in this case, her baby would have been returned to her in April, 2000 and no termination would have taken place.

B.J.M. gave birth to an infant daughter on January 11, 2000, when she was a nineteen year old college sophomore (T. (Vol. 1) 17 L. 23).[1] Because the child was born out of wedlock, she faced the difficult decision of whether to exercise her right to maintain her relationship with her child or make the life altering and gut wrenching decision to waive her most important right and surrender Baby A for adoption. The record in this case is replete with evidence that the petitioner wanted to fully explore how she could keep her child, but was not fully informed about how her plan could be effectively carried out. It is clear that she never felt that she had all of the information necessary for an informed decision and had a very profound ambivalence. She was subjected to immense pressure by the counselor for Family Options who steadfastly urged adoption throughout the counseling period. B.J.M.'s hospital records revealed that she was clinically depressed over the decision she faced, was under enormous stress and was diagnosed as being in a state of depression before and after she signed the surrender document on January 21.

Within 48 hours, B.J.M. felt waiver of her rights was wrong for herself and the baby and stated she wanted the baby back. B.J.M., in a state of depression, slept with her mother immediately upon returning from the hospital.

---

1. T (Vol 1) 17 L. 23 refers to transcript of the trial lodged with the Appellate Division.

Petitioner was contacted by one Christine Letezia (hereafter Letezia), the employee of Family Options who "counseled" the petitioner about her options. Letezia contacted B.J.M. at the invitation of petitioner's doctor. T. (Vol. 1) 31 L. 6. Letezia's focus, for the entire period of her contact with B.J.M. was to encourage surrender and adoption in violation of the state regulations. In fact, Letezia worked for a private adoption agency which billed prospective adoptive parents for the time she spent with the petitioner. T. (Vol. 8) 218-219 *passim*. A fair reading of the record supports the conclusion that her loyalty to the prospective adoptive couple compromised her duty to counsel petitioner on adoption as a last resort. Letezia called B.J.M. nearly daily, often twice a day. T. (Vol. 1) 48-L. 8.

Once B.J.M. gave birth to her baby she began a painful period characterized by almost constant crying. B.J.M.'s hospital nurse observed that petitioner cried virtually the entire 14 ½ hours that she was in her care. T. (Vol. 4) 174-L. 1 to 7. Letezia admitted that during this time she referred B.J.M. to the Division of Social Services while she was lying in her hospital bed crying on and off. T. (Vol. 8) 13 L. 1 to 8. Letezia admitted that B.J.M. was crying during their meeting the next day on January 12 and she cried during subsequent meetings on the 14th, 15th and 16th. T. (Vol. 8) 159 L. 6-21; 181 L. 9-12. Letezia admitted that petitioner was overwhelmed and confused. T. (Vol. 8) 186 L. 15 to 19. During these sessions, Letezia was supposed to be properly counseling petitioner about alternatives to adoption and termination, but she offered no counseling about alternative daycare and at trial and in depositions Letezia admitted she was totally ignorant about the available process of even placing the baby with D.Y.F.S. temporarily so B.J.M. could arrange her schedule and life for a subsequent return of Baby A. T. (Vol 8) 174-176 *passim*. Letezia never explored or helped formulate plans for B.J.M. to parent her baby as B.J.M. had wanted. Instead, the adoption agency relentlessly urged adoption, criticizing all aspects of B.J.M.'s parenting plan.

Incredibly, dispite her emotional condition, and the obvious difficulty in giving up her rights, Letezia and Family Options refused to allow her the time she needed to properly think through her decision. The agency imposed time constraints on B.J.M. to make her decision. T. (Vol. 8) 188 L. 5, T. (Vol 1) 138-139 *passim*. The agency actually informed the prospective adoptive parents that they would be getting the baby even before the surrender document was signed, petitioner yielding to the pressure of Letezia and the agency.

Two days before the surrender was signed, Letezia told petitioner that she had to reach a decision. She made the false statement that there was no daycare to facilitate the parenting plan B.J.M. was trying to construct and applied pressure to make a decision. T. (Vol 8) 194-L.1; T. (Vol. 1) 159-160. The day she signed the surrender, B.J.M. shopped for clothing for her baby, yet she followed Letizia's instruction on how to behave with the prospective adoptive couple and she signed the document in a state of depression, state of confusion, and clearly without all of the information required by law to be given to her.

Gerry McKnight was the nurse at the hospital who recorded that petitioner was depressed over facing the prospect of losing her baby forever. T. (Vol 4) 197-L. 13 to 21. McKnight testified that she discussed with petitioner the reason for her crying and B.J.M. confirmed that her sadness and crying was due to the prospect of losing the baby to adoption. T. (Vol.4) 168 L. 11 to 23. When B.J.M. gave birth, she appreciated the reality of the child for the first time. She had to now come to grips with the conflict between her original stated intention during the pregnancy to surrender the child and the fact that she now had powerful and overwhelming love for, and a bond with the child. For the first time the child was real and she had to now start over in her thought process. T. (Vol. 4) 168 L. 17 to 19. Nurse McKnight testified that "every time I broached the subject of the adoption she started crying. Tears would fill up in her eyes and she'd start crying." T. (Vol.4) 174. The petitioner's distress

was so obvious and profound that Nurse McKnight stayed two hours past the end of her shift to comfort B.J.M. T. (Vol.4) 174-175.

McKnight testified:

> She (B.J.M.) was very vulnerable and I felt very badly for her. I wanted to stay and comfort her, to try and help her to put things in perspective without making any suggestions to her or influence her decisions in any way. See T. (Vol.a4) 175 L. 1-177, L. 11.

Later, the nurse added:

> She (B.J.M.) was not clear on anything. She wasn't sure of any decision that she wanted to make. I asked her if she had considered any other options and she said not really...She said, well, she did make some comment that she felt pressured, that she felt she didn't have enough time and once she saw the baby she said this isn't really enough time. *Id.*

Even the respondent's paid expert psychologist, Karen Wells, admitted that the petitioner suffered from depression throughout the entire period relevant to the issues in this case. T. (Vol. 12) 68 L. 13 to 18. The trial court relied upon the testimony of Letizea concerning claims she made about counseling which were never documented in her contemporaneous and copious notes of conversations with petitioner. The trial court's finding of fact actually conflicts with the documented notes of Letezia. Based upon the notes of Letezia, no real counseling took place.

The case notes introduced into evidence in this case documents that after the agency decided to impose a deadline for B.J.M.'s decision about surrender, the agency canceled the transfer of Baby A out of the agency's custody to a paid foster care provider as requested by B.J.M. This defiant refusal to

follow the petitioner's wishes was made without the knowledge or consent of B.J.M. (or her mother). (*See* Plaintiff's Appendix in App. Div. P. 336 to 338). Even respondent's expert Dr. Wells, testified it was totally inappropriate to impose a deadline on petitioner's decision whether to waive her right or not. T. (Vol. 12) 65-1 to 66-3.

The petitioner produced an expert psychiatrist who testified to the psychology of a birth mother like B.J.M. He testified that the circumstance she was in was inherently stressful, and decision making was extraordinarily difficult. He explained that she was, under the circumstances of this case, incapable of making an informed, reasoned and truly voluntary decision. His testimony was ignored by the trial judge who decided this case purely on the basis that the petitioner had to prove duress. The trial judges's reliance upon the fact that petitioner thought about adoption for fifty days before the child's birth was totally irrelevant in light of the fact petitioner could appreciate the reality of the child and what she would be surrendering for herself and the child only after the child was born. B.J.M.'s experience in this regard is consistent with New Jersey case law that holds that a consent to give up a child before birth is uninformed. *Baby M*, 537 A.2d 1227, 1240 (1988).

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted in this case under Rule 10(b) and 10(c) for three compelling reasons. First, the New Jersey courts decided an important Federal Constitutional issue in a way that directly conflicts with the controlling decisions of this Court in *Santosky v. Kraemer*, 455 U.S. 745 (1982) and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). The New Jersey courts expressly refused to follow *Santosky's* requirement that the state employ the higher evidentiary standard of clear and convincing evidence in deciding disputed questions of fact, the determination of which decided whether or not the petitioner's constitutionally protected interest in her relationship with her child would be terminated by an order of the state court.

The state court also stated that it was exonerated from employing Federal Due Process standards because those standards are confined to situations where the state itself is the litigant seeking to terminate the mother's constitutional rights, contrary to this Court's decision in *M.L.B. v. S.L.J.*, *supra.*

Second, the insistence of the New Jersey court that the *Santosky* standard does not apply to terminations based upon an alleged waiver demonstrates that there is a very important constitutional issue that this Court has not specifically addressed, but should be decided by this Court. New Jersey maintains that its courts can enter judgments terminating the fundamental rights of the mothers of infants and the proponent of that termination has no burden of any standard to prove the factual basis for the termination, as long as there is a mere allegation that the mother "waived" her rights by signing a statement to that effect. The proponent of termination, under New Jersey law, does not have to establish that the waiver was voluntary, that it was informed, that it was knowing and intelligent, that it was not obtained by fraud, and not obtained by duress. The reason New Jersey has taken such an unconscionable position is only because this Court has not rendered a decision that states that the *M.L.B.* requirements of due process, generally, and the *Santosky* standard in particular, apply to the kind of termination of the mother's rights in this case. In addition this case involves questions about standards for taking waivers of the mother's right and the arbitrary and irrational imposition of irrevocability of a waiver of that right.

Third, it appears clear that there is a conflict between at least two states concerning the question whether minimum Federal Due Process requirements must be met in a state court proceeding which results in the termination of a mother's parental rights, and whether the *Santosky* standard of clear and convincing evidence must be imposed upon the proponent of termination, where the proponent of termination asserts waiver of the rights as a basis for termination.

Introduction: New Jersey's Adoption And Termination Statutory Scheme

Every adoption involves the termination of the mother's constitutional rights because "*without a valid termination there can be no adoption.*" *In the Matter of Baby M*, 109 N.J. 396, 428, 537 A.2d 1227 (1988) (emphasis added); *In Re Adoption of Children by D.*, 61 N.J. 89, 95 (1972). The requirement for a termination of the natural mother's rights as a condition of adoption applies to all adoptions, whether they be private placements, or agency adoptions. *Baby M*, 109 N.J. at 428; N.J.S.A. 9:3-46a, 47c, 50. Obviously, no power other than the state can terminate a mother's fundamental interest in her relationship with her child. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1992). Termination of these rights did not exist at common law, but can be granted "only on proof of statutory requirements". *Baby M*, 109 N.J. at 444.

Under the New Jersey statutes there are four separate statutory procedures by which a mother's parental rights may be terminated, but only two separate grounds upon which the state may do so. Two of these procedures concern actions instituted by the state's Division of Youth and Family Services (hereafter "D.Y.F.S.") or a licensed adoption agency where the alleged grounds for the termination is the parent having forsaken his or her parental duty. These cases involve proof of "unfitness" and the standard imposed is very strict to reflect the constitutional significance of the interest being protected. *N.J. D.Y.F.S. v. A.W.*, 103 N.J. 591, 603 (1986). Thus, under New Jersey law, in these cases the state (or agency) must prove by clear and convincing evidence that: (1) the child's health and development has been or will be seriously impaired by the parental relationship; (2) the parent is unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm; (3) show

consideration of all alternatives to termination; and (4) the termination of parental rights will not do more harm than good. *N.J. D.Y.F.S. v. A.W.*, 103 N.J. at 604-612.

A termination of a parent's rights by D.Y.F.S. based upon "unfitness" is governed by N.J.S.A. 30:4c-15 to 30:4c-15.4 and begins by the filing of a complaint which alleges the facts upon which the unfitness of the parent is based, and provides for notice to the parent, provides free counsel for those who can't afford one and places the burden on the state to prove its case to the satisfaction of the court by clear and convincing evidence.

N.J.S.A. 9:2-18 - 9:2-20 allows for an action brought by a licensed adoption agency to terminate the rights of a parent based upon the unfitness standard, which is substantially the same standard as that imposed upon the state in a D.Y.F.S. proceeding. *Baby M*, 109 N.J. at 426. However, in contrast to D.Y.F.S., who can initiate an action without the parent first seeking its assistance, a licensed adoption agency can bring an action under N.J.S.A. 9:2-18 only after a parent has voluntarily placed the child in the custody of the agency under N.J.S.A. 9:2-16, -17.

The third and fourth procedures which result in termination of a mother's constitutional rights are those involved in adoption procedures where the parent originally contemplated letting a third party adopt the child. There are two kinds of adoptions, private placement where no state or licensed agency is involved, and the licensed agency adoption.[2] In a private placement adoption the termination of the mother's rights can never be achieved by a written waiver of her rights regardless of the mother's intent, and thus, even if she signs a document purporting to waive her rights, which was freely given and

2. D.Y.F.S. can initiate an adoption where the natural parent voluntarily surrenders the child to the agency, and consents to an adoption pursuant to N.J.S.A. 30:4c-23. For purpose of this analysis, the voluntary surrender to D.Y.F.S. under 30:4c-23 is not significantly different from the "voluntary" surrender to a licensed adoption agency treated in more detail hereafter.

informed, the mother can request the return of her child. *Sees v. Baber*, 74 N.J. 201, 377 A.2d 628 (1977); *Baby M*, 109 N.J. at 427. For a court to enter an order terminating a mother's parental rights under the private placement adoption statute, there must be a finding that "the parent is unable to perform the regular and expected parental functions of care and support of the child and that the parent's inability to perform those functions is unlikely to change in the immediate future". N.J.S.A. 9:3-46. It is clear that the plaintiff in a private adoption in New Jersey seeking judgment of adoption would have to satisfy this standard for termination by clear and convincing evidence for such termination to meet the minimum requirements of due process. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 n.8 (1996).

Underlying the considerations which result in refusal to recognize a "consent" to adoption or waiver of the mother's rights in the private placement context is the state's policy that "it is necessary and desirable to protect the child from unnecessary separation from his natural parents", a policy that "is not simply some theoretical ideal that in practice has no meaning". *Baby M*, at 435; *see also Wilke v. Culp*, 196 N.J. Super. 487, 496 (App. Div. 1984), *cert. den.*, 99 N.J. 243 (1985); *In Re Adoption by J.J.P.*, 175 N.J. Super 420, 426 (App. Div. 1980).

It is in this context that the statute uniquely applicable to this case, those that govern adoptions through a licensed adoption agency (N.J.S.A. 9:3-41, 41.1, 42, 45, 45.1, 47, and 50) is best understood. Under this statutory scheme the licensed agency is permitted to take a waiver of the mother's rights which is enforced and even deemed "irrevocable". N.J.S.A. 9:3-41. When the complaint for adoption is filed, which includes relief in the form of the termination of the mother's rights, no notice need be given to the natural mother who signed a waiver in favor of a licensed agency. N.J.S.A. 9:3-45b(1).

The statute states that the surrender of rights is "irrevocable except at the discretion of the approved agency taking such

surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency". N.J.S.A. 9:3-41(a). The statute states that the termination of the rights of the natural mother must be contained in the judgment of adoption N.J.S.A. 9:3-50. By definition, "termination of parental rights means the transfer by an order of a court of competent jurisdiction of all rights of control and authority over a child from its birth parent(s) to an agency or other person". N.J.A.C. (Dept. Of Human Services) 10:121A-1.6.

Because, unlike N.J.S.A. 9:2-16 to 20, and all other methods of termination, the statute does not require notice of the complaint for adoption to be served upon the mother, no provision is actually made for a mother to assert her rights within the adoption procedure itself. Therefore the burden is placed upon the mother to bring her own action to set aside the alleged waiver of her rights.

On the face of the statute it may not appear that the setting aside of the waiver can be achieved if the waiver was uninformed, involuntary or unknowing, as opposed to being obtained by outright duress or fraud. However, N.J.S.A. 9:3-39.1(b) and (c), 9:3-40, 9:3-41(a), (b) and (d) and 9:3-45.1 requires the agency to counsel the mother prior to accepting the waiver of her rights, about all other options available to her beside adoption. The underlying policy is to keep the mother and child together wherever possible. *Baby M*, 109 N.J. at 435. The N.J. department of Human Services has the power under the statutes to issue regulations expounding upon the kind of counseling the licensed agency must give to the mother before taking a surrender of her rights. N.J.A.C. 10:121A *et seq.*, sets forth those requirements which includes, at a minimum, that the agency fully explore all alternative plans for the child other than surrender of rights and adoption, prepare the mother for separation where relevant, and refer the mother to other

community resources when the agency cannot provide the needed services. N.J.A.C. 10:121A-5.4.

The fact that a licensed agency is required to insure that there is full counseling which explores all alternatives to termination is designed to protect the mother's rights by insuring that a waiver of those rights is informed and voluntary.

> It seems most unlikely that the legislature intended that a consent (to terminate) not complying with these requirements would also be irrevocable . . . [T]hese strict prerequisites to irrevocability constitute a recognition of the most serious consequences that flow from such consents: termination of parental rights, the permanent separation of parent from child, and the ultimate adoption of the child . . . *[T]he legislative goal is furthered by regulations requiring approved agencies, prior to accepting irrevocable consents, to provide advice and counseling to women, making it more likely that they fully understand and appreciate the consequences of their acts. Baby M*, 109 N.J. at 432-33 (emphasis added).

Thus it is clear that the waiver of the mother's rights, under New Jersey law, can be set aside on the grounds that the waiver was not informed, knowing and voluntary if the counseling and other requirements of the statutes and regulations are not met. The justification to make the surrender irrevocable is precisely because those counseling requirements must be met.

I. THE DECISION OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY DIRECTLY CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT IN *SANTOSKY v. KRAEMER* AND *M.L.B. v. S.L.J.*

The New Jersey Appellate Court erroneously refused to follow this Court's decision in *Santosky v. Kraemer*, 455 U.S. 745 (1982) and require the proponents of termination to prove the basis for termination by clear and convincing evidence. The New Jersey court argued that termination of the mother's rights can be achieved without requiring the proponent of termination to prove facts necessary to support the basis for termination as long as the proponent merely alleges that the mother "voluntarily surrendered the right to raise her child". The Appellate Court stated that an order can be entered in a state judicial proceeding resulting in the termination of the mother's rights without the need to meet the requirements of due process because the state is not a party and therefore, "the state has not interjected itself into the parent-child relationship". *See* A.D. Opin. at A17 to A21. The state court's holding that due process standards do not apply to the proceeding in this case is in conflict with this Court's decision in *M.L.B. v. S.L.J.*, *supra.* The state court's refusal to impose the clear and convincing standard of proof upon the respondents is in direct conflict with *Santosky v. Kraemer*, *supra.*

A. The Substantive Right

There is no dispute in this case that the mother's interest in her relationship with her child is protected by the due process clause as a fundamental liberty interest. Both the trial court (*See* Tr. Opin. at A36, A37, n.3) and the Appellate Division (A17 to A21) recognized this principle. However, the nature and magnitude of the right requires some comment. The entitlement to protection of this fundamental right was first declared to be "self-evident" in *Meyer v. Nebraska*, 262 U.S. 390 (1922) and reaffirmed as such in subsequent cases.

E.g., *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). Recently this Court observed that it is the oldest liberty interest ever identified by this Court. *Troxel v. Granville*, 2000 WL712807 (2000).

The mother's interest in her relationship with her child is always protected as fundamental even when the child is born out of wedlock. The factual differences involved in the mother carrying the child and having natural custody before and immediately after birth distinguishes the mother's relationship from that of the unmarried father.

> . . . [U]nwed mothers and unwed fathers are simply not similarly situated, . . . our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child . . . these common-law and statutory rules of law reflect the physical reality that only the mother carries and gives birth to the child . . . *Caban v. Mohammed*, 441 U.S. 380, 398-99 (1979).

Justice Stevens, in his dissent, emphasized the relationship between a mother and child during pregnancy and immediately at birth, noting the fact that the mother's relationship with her child began at conception, and continued during pregnancy when bonding actually started.[3] *Id.* at 404-405.

---

3. (Stevens, J., dissenting) (citing 1&2 J. Bowldy, *Attachment of Loss* (1969, 1973); M. Mahler, *The Psychological Birth of the Human Infant* (1975)). To this list of authorities we may add the following: Klaus and Kennel, *The Family During Pregnancy,* in Parent and Infant Bonding, 1-2 (1982); Sugarman, *Parental Influences in Maternal Infant Attachment*, 47 Am. J. Orthopsychiatry (1977); Lumely, *Attitudes to the Fetus Among Primagravidae*, J. Australian Pediatric 106, 108 (1982); Leister, *Psychological Effects of Motherhood* 76 (1980).

The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983) adopted much of the reasoning of Justice Stewart's dissent in *Caban*: "*The mother carries and bears the child, and in this sense her parental relationship is clear.*" *Id.* at 259-60, 260, n.16 (emphasis added). The Fourteenth Amendment concept of substantive due process protects the mother's relationship with her child from unwarranted governmental intrusion. *Santosky v. Kraemer*, 455 U.S. 745; *Stanley v. Illinois*, *supra* (1982). Preservation of the benefits, beauty and joy of that relationship is one of the greatest rights and interests a woman possesses in all of life.

Because of the magnitude and importance of the child's relationship with her mother, New Jersey's policy is that all doubts are to be resolved against its destruction. *In Re N*, 96 N.J. Super. 415, 425 (App. Div. 1967). The New Jersey Supreme Court has observed that the bond between a birth mother and her child is so important that its continuance should be preserved, not just for the mother's benefit but for the benefit, of the child, so that the courts should scrupulously attempt to keep the natural mother together with the child, where the mother is not unfit. *In the Matter of Baby M*, 109 N.J. 376, 462-63 (1988). This Court has also observed that "historically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 422 U.S. 584, 602 (1979); *see also Troxel v. Granville*, 2000 WL 712807 (2000).

B. New Jersey Can Not Avoid the Requirements of Procedural and Substantive Due Process Merely Because a State Agency is Not Party to This Action

Both the trial court and the Appellate Division stated that the minimum requirements of the due process clause of the Fourteenth Amendment do not apply to this case merely because an agency of the state is not a party seeking termination. This holding of the courts is in direct conflict with *M.L.B. v.*

S.L.J., 519 U.S. 102 (1996). In *M.L.B.* the proponent of the termination of the mother's rights was a private citizen, the former husband of the child's mother. This Court stated:

> M.L.B.'s case, involving the state's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake. Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: *M.L.B.* resists the imposition of an official decree extinguishing, as no power other than the state can, her parent-child relationships.

M.L.B. v. S.L.J. 519 U.S. 102 at 116-117, n.8.

However the state action in this case is far more pervasive than that of the state in *M.L.B.*. The very concept of termination of parental rights is a state creation. Its sole purpose is to advance the perceived interests of the state, and that purpose is achieved by adversely and intentionally impacting the fundamental right. Its termination is its objective. Any involvement of a private actor is incidental to the statutory scheme creating the method of termination. Private parties themselves can never act to terminate a mother's rights. *Baby M*, 109 N.J. 396, 425-434; 444-48. Where a licensed agency is involved, it is only because the state created the concept of such an agency in order to effectuate the state's statutory scheme. Such an agency's taking of a waiver of the constitutional right is by authorization of the state: the precise method is defined by the state; the agency is licensed by the state for the very purpose of being involved in the process of terminating the constitutional right; the agency is supervised and regulated by the state; and the agency's actions are subject to judicial review to determine if the agency acted in strict compliance with the statutes and regulations authorizing the agency's involvement in the termination. In effect, the

agency is deputized by the state. *See Flagg Bros. Ins. v. Brooks,* 426 U.S. 149, 157 (1978). *See, e.g. In re R.J.C.*, 300 So. 2d 54, 58 (Fla. 1st Dist. Ct. App. 1974); *Swayne v. L.D.S. Soc. Servs.*, 795 P. 2d 637, 640 (Utah 1990). Whether or not the litigation can be said to be between two private parties, the power to terminate the rights of the mother rests solely on the judicial branch of government. *G.A.H. v. R.L.A.*, 712 So. 2d 4, 6 (Fla. 1998); *Accord, In re K.L.J.*, 813 P. 2d 276 (Alaska 1991); *In re Jay [R.]*, 150 Cal. App. 3d 251, 195 Cal Rptr 672 (1983); *D.S. v. T.D.K.*, 499 N.W. 2d 558 (N.D. 1993). Thus, although the state statute itself, the judicial hearing standards dealing with proofs and court order are clearly and indisputably state action subject to the requirements of due process, the actions of a licensed agency is subject to due process as well.

C. New Jersey's Failure to Require the Proponents of Termination in This Case to Prove the Basis of Termination by Clear and Convincing Evidence is in Conflict with *Santosky v. Kraemer*

The trial court refused to impose the higher standard of proof for three essential reasons and the Appellate Division affirmed on essentially the same grounds. First, the court stated that in voluntary agency adoptions the presence of documents and existence of regulations and strict standards make it more difficult to fabricate facts. This both begs the question and illustrates that underlying facts which allegedly supported termination were presumed to be true by the court. That assumption is the very antithesis of the role this Court directs that the state court must assume: the diligent and jealous arbiter of facts. In this case there is no doubt that a surrender document was signed. The question was whether it truly represented a valid, informed, knowing, intelligent, and voluntary waiver of a fundamental right. It was incumbent upon the Court to look beyond the document itself. An uninformed or involuntary waiver of the mother's fundamental rights and interests in her relationship with her child is constitutionally

deficient. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The very factual issue to be determined was whether the "strict standards" and regulations were in fact carried out. To say that the existence of the regulations and standards should lower the standard of proof defeats the very purpose of those regulations and standards in the first place. Simple justice requires that the agency, to which the sacred task of safeguarding the waiver process has been entrusted, should bear the burden of proof. It was the regulated agency which sought to obtain a waiver of the fundamental right from a young, unsophisticated mother who was clearly in crisis and burdened with a difficult and life altering decision. The court presumed, irrevocably at that, that this young mother initiated all contact and aggressively pursued the agency. The record in this case supports the opposite conclusion. For the state to place the burden of proof on the mother to prove why her rights should not be terminated violates the entire concept of the state's duty to protect the interests involved.

Second, both the trial court and the Appellate Division relied heavily upon the fact that the termination involved a "voluntary" rather than an "involuntary" termination. In fact, that is more reason for the court to hold the agency to a higher standard of proof because the child's best interests are not in danger of harm by the mother, unlike the involuntary termination, and there is really no interest of the state to be advanced unless and until the mother clearly needs or wants to waive her rights. The state's interest is actually in preserving the relationship because it is in the child's best interests to do so. Since the state has entrusted the taking of a waiver of a fundamental right to the agency, and has deemed it "irrevocable", it is incumbent upon the court to insure that no abuses were employed to induce the waiver of rights where both the interests of the mother and child are harmed by termination. The state can't shirk its solemn duty to protect the mother's fundamental rights and the interests of the child in her relationship with her mother by delegating the taking of the waiver to an agency and then imposing a lesser burden upon the agency than it would upon the state itself.

Finally, the court stated that the "child's best interests" is a "competing" interest with that of the mother. Whether or not the child's best interests is or is not served by a termination is a question of fact to be determined by the proofs, not a question which gives reason to reduce the standard of those proofs. But, more importantly, the child's interests are not in competition with those of the mother in a voluntary termination proceeding. The mother's fitness is not an issue and the timeliness of the plaintiff's notice that she wanted the return of her child (two weeks) coupled with the order allowing visitations to nurture the mother-child bond, eliminated any risk that the short two week lapse of time threatened the well being of the child. What is two weeks compared to the nine months of pregnancy and child birth and the subsequent lifetime of the mother who wanted to nurture her child? To the contrary. It is in the best interest of every child to be given the opportunity to know, love and maintain a relationship with her natural mother. It is a first principle of New Jersey public policy that a mother and child not be separated, but kept together. *Baby M*, 109 N.J. at 441-442. Keeping them together, because of the natural bond which takes place during pregnancy and child birth, is in the child's interest, not just the mother's. *Baby M*, at 462.

II. THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL QUESTIONS THAT THIS COURT HAS NEVER DIRECTLY ADDRESSED BUT SHOULD DECIDE

There are three separate issues of constitutional significance that this Court has never decided but should decide. The first of these is whether the *Santosky* standard of proof specifically applies in cases where the state court is called upon to terminate a mother's fundamental interest in her relationship with her child on the grounds that she voluntarily and knowingly waived her rights. In this context the factual basis for termination is that created by the state. *Santosky* makes it clear that where the state creates regulations which require full and extensive counseling

to insure that the mother's decision is truly informed, the state must require the agency which claims that the waiver was informed to prove by clear and convincing evidence that the mother was in fact fully informed, and was free from the kind of pressure which defeats the voluntary nature of such a decision.

The second question involves the minimum standards under federal constitutional principles for the waiver of a fundamental right.

The third issue this Court has never decided concerns the constitutionality of New Jersey's statute that makes irrevocable a waiver of the mother's right once actually made as it was applied in this case. The courts in this case refused to even consider the attempted revocation of the alleged waived as evidence that the waiver was not informed, voluntary or freely made representing a true decision of the mother. Instead of being considered evidence of the mother's real ambivalence, it was used by the court to create a presumptive basis for termination of the mother's rights. Its mere existence, without any proof that it was properly obtained was used, in and of itself, as the basis for termination. It was used to shift all burden of proof to the nineteen year old woman whose life was torn apart over the decision concerning that very document.

The New Jersey courts treated the document as impenetrable even if the mother asked for the return of her child immediately after signing the document. Such a statute, as it is applied to the facts of this case, is a clear violation of the substantive due process rights of the mother.

An uninformed or involuntary waiver of a fundamental right and interest is constitutionally deficient. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

> It has been pointed out that "courts indulge every reasonable presumption against waiver' (*Aetna Ins. Co. v. Kennedy*, 301 U.S. 387, 393; *Hodges v. Easton*,

> 106 U.S. 408, 412) of fundamental rights" (*Ohio Bell Tel. v. Pub. Utilities*, 301 U.S. 292, 307). A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege . . . These principles [of law] however, must be construed and applied to preserve – not destroy – constitutional safeguards of human life and liberty.

Id. 464-65.

Where the Constitution protects a particular right, failure to impose strict due process requirements upon how that right can be waived could nullify that right itself. *Id.* at 465. Thus the requirements for an effective constitutional waiver of the mother's fundamental interest in her relationship with her child are part of the right itself. At a minimum the waiver, to be effective, must be voluntary, informed, knowing and intelligently made. *Brady v. U.S.*, 397 U.S. 742, 748 (1970). The relationship between mother and child is considered "inviolable". *D.Y.F.S. v. A.W.*, 512 A.2d 438, 442 (1986); *Baby M*, 537 A.2d 227, 1251-1262. "The standard (for waiver) must therefore reflect the constitutional significance of the interest being protected." *D.Y.F.S. v. AS.W.*, at 144. The record below cannot be said to support a finding by clear and convincing evidence that the constitutional standard for waiver of a fundamental right was met.

Secondly, and perhaps more importantly, the plaintiff did not, in the truest sense, voluntarily waive her rights. The entire termination was contested by her in court upon her initiation of an action to declare the waiver void, and the order was entered against her objection. Rather, the state sought to determine if the plaintiff had a past intent to waive her rights at one single moment in time. The state's statutory scheme makes a waiver of the mother's right totally irrevocable regardless of the fact that the mother quickly expressed her desire not to waive her rights, or that it was in the child's interest that the relationship be maintained. This irrevocability violates not only the mother's

protected interests but those of the child where the child's best interests require maintaining a relationship with her natural mother and where there is no showing of harm to the child by a timely revocation by the mother.

The United States Supreme Court has acknowledged that the emotional and financial crises of the mother of a child conceived out of wedlock renders decisions about her child's welfare uniquely difficult. For that reason, in part, rigid time frames imposed on the mother to reach a decision about her welfare and that of her child have been found to be unconstitutional. *Clark v. Jeter*, 486 U.S. 456 (1988); *Pickett v. Brown*, 462 U.S. 1 (1983). In *Clark*, a unanimous Court observed that *Picket*:

> . . . concluded that the 2-year period (in *Pickett*) was too short in light of the persisting financial and emotional problems that are likely to afflict the child's mother. Even six years does not necessarily provide a reasonable (time frame because) the unwillingness of the mother to file a claim . . . could stem . . . from the emotional strain of having an illegitimate child. *Clark*, at 463. See, also *Pickett v. Brown*, 462 U.S. at 6.

Where the state impairs or adversely affects a fundamental liberty interest the state law is subjected to strict scrutiny. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). That means if the state can achieve the interests it seeks to advance by a less intrusive means, it must do so.

The state interest sought to be protected by the irrevocability is the best interest of the child. *See* Tr. Op. at A35-A39. However, the child's interests are in keeping her relationship with her mother because of the bond between them. *Baby M*, at 462. Unless the lapse of time so endangers the well being of the

child, the state has absolutely no interest in keeping the mother and child apart. *Sees v. Baber*, 74 N.J. 201 (1977). In this particular case there was no finding of fact which justified the conclusion that the child's best interests were harmed by returning the child to her mother. It is not a legitimate function or interest of the state to take a child from her mother based on a technicality. The strict irrevocable nature of the waiver frustrates the interests of the child, the purported interest the state seeks to protect. Thus, the state has no interest in refusing to recognize the revocation, compelling or otherwise. Enforcement of the irrevocable nature of the waiver as applied in this case violates the due process rights of the plaintiff. The state's interest in advancing the interest of the child is best protected on a case by case basis and the state must do so where that interest can be protected without terminating the mother's rights. *Smith v. Organ. of Foster Families*, 431 U.S. 816, 862-863 (1977). The state's objective of maintaining a predictable adoption procedure can be achieved by less intrusive means than the use of the irrevocable surrender New Jersey employs. Many states permit periods of revocation and meaningful judicial review even before the surrender is signed.

It should be noted that New Jersey's law, unlike that of other states, which neither provides for a judicial review to determine the informed and voluntary nature of the waiver before signing a relinquishment document, nor providing for a period of revocation of a waiver, places New Jersey in a minority position. *See* 2 Am. Jur. 2d Adoption § 1104; 74 ALR 3d, 435-436.

III. THERE IS AN APPARENT CONFLICT BETWEEN THE DECISION OF THE NEW JERSEY COURTS IN THIS CASE AND THOSE OF AT LEAST TWO OTHER STATES WHICH IMPOSE THE *SANTOSKY* STANDARD OF PROOF IN NON STATE AGENCY WAIVER CASES

There appears to be a conflict among various states on the issue of whether the *Santosky* standard of proof must be employed in a case where the basis for a termination is the alleged voluntary waiver of the mother's right. At least three states impose the burden to prove the basis of termination in voluntary waiver cases by clear and convincing evidence. *See In the Matter of a Female Child*, 938 P. 2d 1184 (HI 1997); *Meza v. Rodriguez*, 305 Del App. 3d 777 (1999); *William D. v. Shawna Renee A.*, 1999 N.L. 1188850 (W. Va.); *See* footnote 3 of Tr. Opin. at A 37.

Although Illinois and Hawaii do not specifically state that it employs this clear and convincing evidence standard specifically because they feel compelled to do so by *Santosky*, it can be inferred that that is the very reason that standard is employed. It is reasonable to conclude that those states follow *Santosky* and see no need to issue extended comment on a basic principle of constitutional law so clearly settled for almost two decades.

In any event, this divergence in how the states treat a right of such magnitude illustrates that there is a present need for this Court to decide this issue.

CONCLUSION

This Counrt should grant the Writ and decide the issues presented in thhis case.

Respectfully submitted,

HAROLD J. CASSSIDY
Counsel of Reecord
961 Holmdel FRoad
Holmdel, NJ 007733
(732) 332-93000

ROBERT W. GOODMAN
50 Main Street
Hackensack, NJ 07601
(201) 488-7100

JOSEPH E. MARLEY
66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 422-1771

Attorneys for Petitioner

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED, DECIDED AND FILED JANUARY 9, 2001

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-4675-99T5F

B.J.M.,

Plaintiff-Appellant,

v.

FAMILY OPTIONS, E.R.B., and P.L.B., his wife,

Defendants-Respondents.

Argued telephonically November 28, 2000 —
Decided JAN 9 2001

Before Judges Cuff and Lefelt

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FD-20-721-00.

* * *

PER CURIAM

After giving birth on January 11, 2000, plaintiff B.M. surrendered her baby on January 21, 2000 to defendant

Appendix A

Family Options for adoption by defendants E. and P.B. Shortly thereafter, however, plaintiff sought the return of her child, contending that she surrendered her baby under duress. After a thirteen-day trial, she appeals from Judge Lyons' judgment that plaintiff's surrender was valid, binding and irrevocable pursuant to *N.J.S.A.* 9:3-41a. We substantially agree with Judge Lyons' findings and conclusions contained in his comprehensive fifty-seven page decision and affirm.

Plaintiff was an eighteen-years old college student who became pregnant sometime in April 1999 after a brief sexual encounter. Not until November 29, 1999, however, about sixteen days after plaintiff had become nineteen-years old, did she discover that she was eight-months pregnant. Plaintiff chose not to involve the baby's father in the pregnancy. Plaintiff's mother was sympathetic to her daughter's situation and remained supportive throughout all subsequent events.

Plaintiff's internist put her in contact with defendant Family Options, a licensed New Jersey private adoption agency. Most of plaintiff's contacts with the agency were facilitated by one of Family Option's employees, social worker Christine Letizia, an adoption placement specialist. Plaintiff also had some contact with Diane Propert, the Director of Family Options.

During trial, plaintiff strongly contested the quality and quantity of counseling provided by Family Options, particularly regarding her alternatives other than adoption. It is uncontested, however, that plaintiff had much telephone and personal contact with Letizia and was provided with

some informative, relevant materials. In fact, Letizia provided plaintiff with copies of the surrender documents several times. Plaintiff also played an active role in selecting suitable adopting parents. She rejected one couple, reviewed documentation relating to several other prospective adopters, and participated in several interviews.

Plaintiff delivered a baby girl early on January 11, 2000. Her hospital stay was quite stressful, with plaintiff being depressed and upset. Plaintiff named her baby A. and was discharged from the hospital on January 13, 2000. Instead of taking her daughter home, plaintiff agreed with Letizia's suggestion that Family Options should care for the child during this interim period so that plaintiff could resume her normal life and see how she felt during this initial separation. To accomplish this interim plan, plaintiff signed a Temporary Custody Agreement, a Birthparent's Foster Care Placement Agreement, and a Birthparent Post-placement Information Release.

After returning home, plaintiff did not get much sleep, was very emotional and slept in her mother's bed each night. Plaintiff did return to school and work and continued to consider various portfolios of prospective adopting couples. Several more candidates were interviewed.

Throughout this period, plaintiff was considering parenting A., but no real preparations were undertaken and no family members were available to assist with parenting. Plaintiff continued at school, visited with A., and continued to consider prospective adopting parents.

Appendix A

By January 15, 2000, Family Options, who was caring for the newborn, began pressing plaintiff for a decision. Finally, on January 19, 2000, after plaintiff visited A., Propert and Letizia both stressed that time was becoming crucial. Plaintiff needed to make a decision soon because caring for the newborn was burdensome, and the baby would begin bonding and needed stability. Propert advised plaintiff that, therefore, Family Options could not keep A. beyond Saturday morning, January 22, 2000.

Plaintiff understood that she could have entered into a temporary foster care arrangement or sought a DYFS placement if she was unable to parent A. herself and not ready to commit to adoption. Nevertheless, on January 20, 2000, plaintiff and her mother met with the B.s who were the finalists from all prospective parents that plaintiff had considered. The meeting lasted for over four hours, and plaintiff decided that she would surrender A. to the B.s.

On January 21, 2000, plaintiff told Letizia that she was ready to surrender her child for adoption by the B.s, and that she would like to bring the baby to the B.'s home. That evening, plaintiff signed a Birthparent's Affidavit Regarding Legal Representation, an Affidavit of Surrender of Custody and Consent for Adoption, and a Birthparent Post-placement Information Release. The Surrender of Custody and Consent for Adoption that plaintiff signed specifically stated that she desired "that this document be accepted by all persons as expressing my irrevocable intention to make a permanent surrender of custody and to give consent to adoption as herein expressed." The Affidavit Regarding Legal Representation stated "I do not wish to be represented by an attorney.

Christine Letizia explained our rights in connection with this adoption and has reviewed all the consent documents we signed."

Plaintiff then dressed A. in an outfit and necklace she had purchased for the child and delivered her baby to the B.s. Letizia and Propert left, and plaintiff and her mother visited for approximately forty-five minutes thereafter.

By January 23, 2000, however, plaintiff testified that she felt she had made a mistake, and on January 24, plaintiff's mother began looking for an attorney. While plaintiff claimed she almost immediately had misgivings, she did not immediately inform First Options or the B.s. On February 4, 2000, plaintiff's attorney called the B.s and asked that the child be returned. Following the B.s' refusal to return the child, plaintiff sued Family Options and the B.s, by Order to Show Cause why the child should not be returned. After a relatively lengthy trial, Judge Lyons decided plaintiff's case against her, in favor of Family Options and the B.s, and plaintiff appealed. The child's father played no role in any of the court proceedings, and no one has pressed his interests in this appeal.

In her appeal, plaintiff raises three points of error for our consideration. First, she argues that the surrender of her child must be vacated because Family Options subjected her to duress; second, she argues that Family Options violated several statutory and regulatory requirements in the course of obtaining her surrender; and third, she claims that the statute permitting the surrender of a child, as applied in this case, violated her rights to procedural and substantive due

process. She specifically argues that Judge Lyons should have required Family Options to establish by clear and convincing evidence that plaintiff's surrender was voluntary and not obtained through duress. We consider each of these points in turn.

I.

Under *N.J.S.A.* 9:3-41, when a birth mother surrenders a child for adoption to an approved adoption agency, the decision must be carefully considered because the decision is irrevocable unless fraud, duress or misrepresentation occurred.

Specifically, the statute provides that:

> surrender shall be valid and binding without regard to the age of the person executing the surrender and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency.
>
> [*N.J.S.A.* 9:3-41a.]

Here, plaintiff argues her surrender must be vacated because of duress.

Duress occurs when "there has been moral compulsion sufficient to overcome the will of a person otherwise

competent to contract. . . ." *Shanley & Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* 200, 212 (App. Div. 1987). Pressure may be wrongful if "it is so oppressive under given circumstances as to constrain one to do what his free will would refuse." *Rubenstein v. Rubenstein*, 20 *N.J.* 359, 367 (1956). Plaintiff contends that is exactly what occurred here and that Judge Lyons' findings to the contrary were not based on sufficient credible evidence.

We disagree. After reviewing the record in this case, together with the parties' arguments and pertinent law, we agree with Judge Lyons' observation that this was a case of "distress" and not "duress." Judge Lyons' findings are supported by adequate, substantial, credible evidence and must be accepted by this court. *In re Taylor*, 158 *N.J.* 644, 659-60 (1999).

The record reflects that plaintiff had much opportunity to seek and gain advice from numerous people, including her mother, sister, internist, godmother and godfather, and at least one friend. While plaintiff demeans the quality of the advice she may have received, no one prevented her from obtaining valuable advice. The record does not indicate that she was isolated or immobilized during pregnancy or after she gave birth.

While in the hospital, plaintiff was undoubtedly disturbed and depressed by her situation. She was facing a most difficult decision and suffering discomfort and pain from her delivery. However, there was insufficient evidence presented that plaintiff's depressed condition mandated psychological counseling. Moreover, plaintiff was

discharged from the hospital on January 13, 2000, and she did not agree to surrender her child until eight days later. Thus, plaintiff had time to ponder her decision. Plaintiff also had time to seek additional advice or psychological help, if she believed it was necessary.

We agree that Family Options pressured plaintiff to make a decision and established an arbitrary deadline to accomplish this goal. However, it was important that a decision concerning A.'s future be made at some time. Plaintiff had almost two months from the date she discovered her pregnancy to determine her best option. During this period, plaintiff was able to discuss her situation, understand her dilemma and reach an informed decision. Plaintiff demonstrated the ability to make a decision by rejecting several prospective parents presented by Family Options. Contrary to plaintiff's argument, the record does not support a determination that plaintiff considered either Letizia or Propert as fiduciaries in positions of trust and confidence. The plaintiff was not completely alone during this period; she had the full support of her mother, and after overcoming her initial disappointment, plaintiff's sister also provided support. Plaintiff knew she had other options besides adoption through this entire period. Plaintiff could have obtained more time to make her decision by arranging for private foster care, one of the other options suggested by Family Options.

In this case, the pressure by Family Options was not to force an adoption, but rather, to pressure plaintiff into making a decision about her child's future. In fact, this record demonstrates that plaintiff was confused, indecisive and

conflicted by the serious and emotionally difficult choice she had to make. The record does not reflect that overwhelming pressure was placed on plaintiff sufficient to force her to make a decision that she would not otherwise have made. This was not a situation where plaintiff was forced "to do what [her] free will would refuse." *Rubenstein v. Rubenstein*, *supra*, 20 *N.J.* at 367.

Defendant's expert cogently summarized the situation by stating as follows: "While it is indeed my strong clinical opinion that [plaintiff] may dread the potential consequences of her actions, specifically signing legal and binding documents, there are no indications that she was coerced, forced, or manipulated into this response." The pressure applied by Family Options, in this case, to force plaintiff to decide her child's future cannot be considered duress sufficient to void the surrender under *N.J.S.A.* 9:3-41.

II.

Plaintiff also contends that Family Options violated the applicable statutory and regulatory requirements in obtaining the surrender of plaintiff's child. We deal first with plaintiff's statutory arguments.

Plaintiff contends the surrender was invalid because the surrender documents were not explained to her. The statute requires that before executing the surrender, the approved agency must fully inform the person signing the surrender about the consequences of the surrender. The statute provides that the agency shall

> inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and child. The approved agency shall advise the parent that the surrender shall constitute relinquishment of the person's parental rights in or guardianship or custody of the child named therein and consent by the person to adoption of the child.
>
> [*N.J.S.A.* 9:3-41a.]

Plaintiff claims that she simply signed the surrender without reading any of the documents. Judge Lyons found this testimony incredible, and we are usually bound by a trial judge's credibility findings. *State v. Locurto*, 157 *N.J.* 463, 470-71 (1999). More significantly, in this case, however, Judge Lyons' findings on this point appear to be eminently supported by the record.

Plaintiff acknowledged that she had received copies of the surrender documents as early as December 11, 1999, well before A.'s birth. Thus, plaintiff had the documents for over five weeks before they were signed. Letizia reviewed the documents and, on December 11, 1999, explained them to plaintiff. Plaintiff was again given a copy of the documents on January 12, 2000, in the hospital, and testified that on January 15, 2000 she personally filled out the affidavit in the car on the way to the agency. Plaintiff also called Letizia and asked questions with respect to the documents. Plaintiff admitted understanding the words of the surrender. Plaintiff also was concerned with the first "whereas" clause in the

Surrender of Custody and Consent for Adoption because it indicated that she was "unable properly to support, care for and educate" her child. She asked whether her daughter would ever see the surrender form. In addition, plaintiff testified that she knew the surrender was a final act.

Plaintiff also complains that Family Options violated the governing statute because the agency did not fully explore other options besides adoption that were available to plaintiff. The applicable statute does require that the "approved agency shall offer counseling to the parent, prior to the execution of the surrender." *N.J.S.A.* 9:3-41a. Such counseling shall include the parent's "options other than placement of the child for adoption." *N.J.S.A.* 9:3-39.1.

To implement the statutory counseling services, *N.J.A.C.* 10:121A-5.4(c)1, in pertinent part, specifically requires that before taking a surrender, the agency shall document that the birth parents were:

> Provided at least three face-to-face counseling sessions conducted in a private and professional setting as specified in *N.J.A.C.* 10:121A-3.7(a) or at the birth parents' home, by qualified social work staff on separate days and that the birth parents were:
>
> i. Offered counseling that fully explores alternative plans for the child, including but not limited to temporary foster care, day care and care by relatives;
>
> . . .

> iii. Prepared, along with the child, for surrender and separation;
>
> iv. Referred to other community resources when the agency cannot provide needed services[.]

The rule's purpose of detailing the required advice and counseling is to make it more likely that a parent agreeing to surrender a child will "fully understand and appreciate the consequences" of the act. *In the Matter of Baby M.*, 109 *N.J.* 396, 432-33 (1988).

Plaintiff asserts that her options were not fully explored, and that Judge Lyons erred when he concluded otherwise. Letizia may not have taken specific notes, however, many of her notes do reflect discussions about options. For instance, on December 9, 1999, Letizia wrote "Phone call from [plaintiff]. She wanted to set up a [meeting] at her home to talk about her options . . . ." Moreover, on December 11, 1999, Letizia wrote: "[meeting with plaintiff and her mother] at their home. We reviewed all of [plaintiff's] options. . . ." Regarding the December 11 meeting, Letizia testified about the various options that were discussed. She stated:

> We started talking about [plaintiff's] options. I asked again about parenting, if that was something that they felt [plaintiff] would do. [Plaintiff] was stating that she was in school, that she was working, that she would not be able to care for the baby. [Plaintiff's mother] was saying that she wanted [plaintiff] to continue working. She wanted [plaintiff] to continue going to school.

> She wanted [plaintiff] to be able to travel abroad to Austria in the summer. . . . I asked about family members, was there anybody within the family who would consider adopting the child or would consider a long-term foster care for the child, and they said there was not.

Finally, the notes from January 15, 2000 state "We reviewed all of [plaintiff's] options again. . . ." Thus, in addition to testimony, there was credible evidence that plaintiff was made aware of her other options. Judge Lyons was required to assess the case notes as well as Letizia's testimony in making his findings. The judge was entitled to rely on all credible evidence present in the record to reach his determination.

We find no error in his conclusion that plaintiff was adequately counseled at least three times "face-to-face" concerning her options. Plaintiff met with Letizia at plaintiff's home on December 11 and 14, 1999. Letizia also met with plaintiff in the hospital on January 12, 2000. Furthermore, meetings were held at the Family Options office on December 27, 1999, January 16 and 19, 2000. Finally, they met on January 18, 2000 at a diner. It is true that most of the discussions centered on adoption, but adoption was throughout this period plaintiff's central focus.

Furthermore, the regulation requires that counseling be conducted "in a private and professional setting . . . or at the birth parent's home." Despite the informality of some of the settings, no one is claiming that the parties did not act professionally. Moreover, plaintiff chose those persons she

wanted to accompany her, and the agency did not invite any other persons. Thus, we do not conclude that the agency violated the statute or the implementing regulation dealing with counseling, and we cannot fault Judge Lyons' finding that plaintiff was adequately counseled with respect to her other options so that she fully understood the consequences of her surrender.

Plaintiff also contends that Family Options failed to properly exercise its discretion, as required by *N.J.S.A.* 9:3-41a, when it declined to revoke the surrender. Specifically, plaintiff argues that the agency must consider the best interests of the child, and if the agency had performed such an analysis, it would have revoked the surrender. We disagree.

There was no evidence that the child had bonded with plaintiff or would suffer harm by the adoption. Even if the child's best interests must be one of the factors considered by the agency in exercising its discretion under the statute, there is no evidence in this record that such an analysis would have required the agency to revoke the surrender.

Plaintiff also contends that Family Options violated numerous other regulations in dealing with her case. Plaintiff asserts that Family Options violated the following regulations in the specified manner: *N.J.A.C.* 10:121A-4.1(b)(2), by allowing the executive director or administrator to serve as the social work supervisor; *N.J.A.C.* 10:121A-4.4(b)2iii, because the social work supervisor did not approve "placement arrangements, finalization, and any other changes in the child's legal status;" *N.J.A.C.* 10:121A-3.4, because

the agency did not supply plaintiff with a pamphlet that met the requirements of the regulation; *N.J.A.C.* 10:121A-5.2(c), by failing to provide plaintiff with a detailed, written description of the agency's program as required by the regulation; *N.J.A.C.* 10:121A-5.2(a), because the agency failed to "maintain on file and make available to its clients information on known resources in the community which may be of use to adoptive parents, birth parents, children and adult adoptees;" *N.J.A.C.* 10:121A-5.4(a) and (c), by failing to maintain detailed documentation of contact with plaintiff and the counseling sessions; *N.J.A.C.* 10:121A-4.3(b)2, by failing to make its "staff members aware of specific requirements of the State Adoption Laws and of this chapter that affect the performance of their duties;" and *N.J.A.C.* 10:121A-4.4d, by failing to provide legal, psychiatric, psychological or other professional services.

Some of the regulation violations plaintiff asserts are not supported by the record developed before the trial court. For example, there was no evidence that Propert as the agency director acted as social work supervisor. Similarly, there was no evidence of any inadequate training of agency staff members. In this regard, we also note the obvious inconsistency in one of plaintiff's argument. She argues, on one hand, that Judge Lyons erred in his fact finding by not relying almost exclusively on Letizia's notes, while, on the other hand, complaining that the notes were not kept with sufficient detail to satisfy the applicable regulation.

Moreover, regarding the alleged failure to provide legal assistance, plaintiff signed an affidavit acknowledging that she had a right to an attorney if she wanted one. This

acknowledgment had not been given to plaintiff earlier with the other surrender documents. The agency claimed that they had forgotten to provide plaintiff with a preview copy. However, plaintiff's mother knew that if they wanted a lawyer one could be obtained. In addition, plaintiff knew that she could have obtained an attorney and refused to sign the surrender until she consulted with the attorney. She did not choose that course and instead signed the document waiving an attorney.

After reviewing all of plaintiffs alleged regulatory violations, we find little merit to this argument. At best, any violation of the regulations cited by plaintiff was *de minimis*. Also, and most significantly, the regulations do not provide any penalty or sanction for their violation. Instead, the rules specify that "The Bureau of Licensing of the New Jersey Division of Youth and Family Services (DYFS), Department of Human Services, shall be responsible for implementing and enforcing this chapter." *N.J.A.C.* 10:121A-1.3.

Should Family Options fail to operate satisfactorily under these regulations, the Bureau of Licensing would be responsible for reforming the agency. *N.J.A.C.* 10:121A-1.2(b). Indeed, the Bureau has authority to suspend, revoke or refuse to renew the agency's license, *N.J.A.C.* 10:121A-2.3(a), and can institute a civil action for injunctive relief to enjoin the operation of the agency. *N.J.A.C.* 10:121A-2.5(a). There is no authority to return a child to a birth mother because an agency fails to comply fully, in every detail, with the regulations cited by plaintiff.

Instead, any violation of the applicable regulations is evidential of whether the surrender was handled in

accordance with the statutory requirements. In applying the analysis in this case, therefore, the focus must be whether any regulatory violation singly or in combination establishes that plaintiff surrendered her child under duress. After reviewing the record in light of the claimed regulatory deficiencies, we agree with Judge Lyons when he stated that "Pressure to decide, in and of itself, is not duress. . . .These are, and were, difficult, heart breaking and pressure filled decisions which plaintiff, at the young age of nineteen, had to make. The court is sympathetic in that regard." But, the record supports the conclusion that plaintiff surrendered her child voluntarily and knowingly in compliance with the pertinent statutory requirements, and any of First Options' regulatory violations do not impair that conclusion.

III.

Finally, plaintiff argues that Judge Lyons erred when he required plaintiff to "carry the burden of proof" by a preponderance of the evidence. She asserts that the statute as it was applied in this case violated plaintiff's substantive and procedural due process rights. Specifically, plaintiff argues that the Constitution requires Family Options, as the proponent of termination of her parental rights, to present proof of clear and convincing evidence of an absence of duress, under the applicable statute.

Nothing in *N.J.S.A.* 9:3-41a explicitly states which party must carry the burden of proof to prove duress or establishes the burden of persuasion that would be necessary in this case to establish duress. Ordinarily, allocation of the burden of proof is not specified in a statute, but is left to the courts to

decide as a procedural matter. *In re Will of Smith*, 108 *N.J.* 257, 264 (1987); *Mercedes-Benz Credit Corp. v. Lotito*, 328 *N.J. Super.* 491, 510 (App. Div. 2000).

Generally, in civil cases, "[t]he party asserting a claim has the burden to prove it." *WCI-Westinghouse, Inc. v. Edison Tp.*, 7 *N.J. Tax* 610, 630 (Tax Ct. 1985). However, case law has established two principal exceptions to this general allocation rule: (1) public policy concerns and (2) access to relevant facts. *N.J.R.E.* 101(b)(1), comment 1. In other words, the burden of proof "can vary depending upon the type of proceedings, the comparative interests of the parties, the relative litigational strengths or weaknesses of the parties, and the objectives to be served by the evidence in the context of the proceeding." *Romano v. Kimmelman*, 96 *N.J.* 66, 89 (1984).

In this case, plaintiff is in the best position to acquire relevant facts concerning whether she was subjected to duress. The agency does not have superior knowledge of how its actions might have affected plaintiff. She alone has that knowledge. Furthermore, it is generally considered unusual to require proof of a negative. *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 *N.J.* 312, 330-331 (1998); *Barbato v. Alsan Masonry & Concrete, Inc.*, 64 *N.J.* 514, 532 (1974). It would be much more difficult for any adoption agency to prove an absence of duress than for the birth parent to prove duress.

The statutory language also seems to require plaintiff rather than the adoption agency to establish duress. The statute provides that the birth parent's surrender of the child

is irrevocable unless the approved agency decides otherwise or a court sets aside the surrender "upon proof of fraud, duress or misrepresentation by the approved agency." *N.J.S.A.* 9:3-41a. This language does not imply that the agency must prove the absence of fraud, duress or misrepresentation.

Moreover, while plaintiff as a natural parent has a very significant interest in parenting her own child, *Watkins v. Nelson*, 163 *N.J.* 235, 245 (2000), the Statute also embodies a legislative policy favoring the finality of adoption. And, this matter began with plaintiff surrendering her child. It did not begin with an action to remove plaintiff from her parental role. In this instance, we do not believe that any public policy considerations require that we impose the burden of proof on the agency.

The preponderance of the evidence standard is usually applied in civil cases when the claim advanced is not unusually subject to deception or disfavored by the law. *State v. Sheppard*, 197 *N.J. Super.* 411, 440-41 (Law Div. 1984); *N.J.R.E.* 101(b)(1), note 5. The clear and convincing standard is used when a strong presumption favors a contrary result. *See Auge v. N.J. Dept. of Corrections*, 327 *N.J. Super.* 256, 263 (App. Div. 2000); *Pivnick v. Beck*, 326 *N.J. Super.* 474, 483-84 (App. Div. 1999), *aff'd o.b.*, __ *N.J.* __ (2000). The standard is also imposed when there are disadvantages between the parties, in order to "restore a fair balance between adversarial positions of the parties." *State v. Sugar*, 100 *N.J.* 214, 239-40 (1985).

Due process also mandates the use of a clear and convincing standard "when the threatened loss resulting from

civil proceedings is comparable to the consequences of a criminal proceeding in that it takes away liberty or permanently deprives individuals of interests that are clearly fundamental or significant to personal welfare." *In re Polk License Revocation*, 90 *N.J.* 550, 563 (1982). It is this application which plaintiff argues controls.

Plaintiff asserts that she is attempting to restore a constitutional right — the fundamental right to raise her child. Moreover, she argues that state action is present because a court order is required to set aside the surrender. Consequently, she argues that the clear and convincing standard is constitutionally mandated because what has occurred is similar to the termination of her parental rights. *Santosky v. Kramer*, 455 *U.S.* 745, 747-48 102 *S. Ct.* 1388, 1391-92, 71 *L. Ed.* 2d 599, 603 (1982).

The problem with this argument is that when we focus on the actual surrender, we see that this situation is very different from the normal termination of parental rights under *N.J.S.A.* 30:4C-15.1. In a Title 30 case, the State is involuntarily removing a child from a birth parent's care. In the termination of parental rights case, the child is being removed against the will and over the objection of the birth parent. Thus, the heightened standard of proof is warranted.

In this case, a birth parent has voluntarily surrendered the right to raise her child and subsequently attempted to rescind the surrender, claiming duress. Whether or not there is State action present, the State has not interjected itself into the parent-child relationship. Under this circumstance, it is unwarranted to require the adoption agency to establish

by clear and convincing evidence that it did not achieve the birth parent's surrender of her child by duress. To rescind the surrender in this case, plaintiff must establish by a preponderance of the evidence that First Options obtained the surrender by duress. Plaintiff failed to carry this burden.

IV.

In conclusion, we have found that substantial credible evidence supports Judge Lyons' determination that plaintiff was not subjected to duress and voluntarily and knowingly surrendered her child for adoption. We also conclude that none of the regulatory violations alleged by plaintiff are sufficient to warrant return of a child surrendered for adoption in accordance with the applicable statute. Finally, we also agree that Judge Lyons applied the correct burden of proof in deciding this case against plaintiff.

Affirmed.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, FAMILY DIVISION, UNION COUNTY DATED, DECIDED AND FILED APRIL 18, 2000

SUPERIOR COURT OF NEW JERSEY
FAMILY DIVISION – UNION COUNTY

Docket No. FD-20-721-00

BROOKE JACQUELINE MURRAY,

Plaintiff,

(v)

FAMILY OPTIONS, EDWARD R. BONANNO and PEGGY BONANNO, h/w,

Defendants.

Decided: April 18, 2000.

* * *

LYONS, J.S.C.

The issue in this case is whether under *N.J.S.A.* 9:3-41a, the birth mother may void the surrender of her child, Baby A.

Plaintiff, Brooke J. Murray, (hereinafter "plaintiff") is the birth mother of the child (hereinafter "Baby A") at issue in this case. Plaintiff is a nineteen year old sophomore in

college. The defendants are Family Options, a licensed adoption agency which placed Baby A, and Edward R. Bonanno and Peggy Bonanno, (hereinafter "the Bonannos"), the prospective adoptive parents. Baby A is represented by counsel, pursuant to Rule 5:8A.

Plaintiff argues that the surrender is void because her signature was obtained by duress on the part of Family Options. Plaintiff also argues that she did not receive the proper counseling from Family Options. In addition, plaintiff argues that Family Options is not a properly licensed agency. Family Options argues that the surrender should be valid as it did not subject plaintiff to duress in order to obtain her signature on the surrender documents. Family Options also argues that it discussed and reviewed the options available to plaintiff on several occasions, and thus, complied with the statutorily mandated counseling requirements. The Bonannos argue that the surrender is valid because no duress was exerted on plaintiff by Family Options, and thus, the baby should remain with them.

Procedural History

On February 14, 2000, plaintiff's attorney filed with the court; (1) a Verified Complaint, seeking to regain custody of Baby A, or, in the alternative, to have immediate visitation with Baby A; and (2) a proposed Order to Show Cause ("OTSC") requiring defendants to demonstrate why Baby A should not be returned to her natural birth mother. Based on plaintiff's Complaint, Judge Beglin entered an OTSC on February 18, 2000. The OTSC granted plaintiff temporary visitation with Baby A on a daily basis, not to exceed 3 hours

per day. Judge Beglin scheduled the return date for the OTSC before this court on February 24, 2000.

On the return date, the court reviewed the pleadings, briefs and certifications and heard the arguments of counsel. An Order was entered on February 25, 2000, in which the court: appointed Kathleen B. Estabrooks, Esq., as counsel for Baby A; set a deposition schedule; ordered that plaintiff have visitation on Tuesdays, Thursdays and Saturdays from 10:00 AM to 3:30 PM; that Baby A should be transferred at Ms. Estabrooks' office; and that the trial commence on March 6, 2000. In addition, the court precluded James Miskowski, Esq., from simultaneously representing both defendants, Family Options and the Bonannos, due to a possibility of a conflict of interest. Mr. Miskowski asked to represent the Bonannos, and Family Options, on the record, waived any conflict. Consequently, Mr. Miskowski continued to represent the Bonannos, and Family Options retained Samuel L. Peluso, Esq., who filed the appropriate Substitution of Attorney.

On March 3, 2000, Family Options filed a motion to adjourn the March 6, 2000 trial date and to set aside the February 25, 2000 Order. Also on March 3, 2000, the Bonannos filed a motion to discontinue plaintiff's visitation with Baby A. In addition, Family Options and the Bonannos, filed an Answer and a Third Party Complaint, on March 3, 2000, to terminate the parental rights of "John Doe" or any other alleged or putative birth fathers and to transfer "John Doe's" custodial interest in the child to Family Options.

An Order was entered by the court on March 7, 2000. The following relief was granted: the March 6, 2000 trial

date was adjourned until March 22, 2000; a new deposition schedule was set; the Third-Party Complaint filed by the Bonannos, joined by Family Options, to terminate the birth-father's rights, was severed from this matter and stayed pending completion of this trial; visitation between the plaintiff and Baby A was changed to Saturdays 10:00 AM – 4:00 PM and Tuesdays 5:00 PM – 8:00 PM with Baby A to be transferred at Mrs. Estabrooks' office; Joseph E. Marley, Esq., was listed as co-counsel for plaintiff; Family Options's motion to set aside the February 25, 2000 Order was denied; and the case caption was amended to change Family Option Adoption and Infertility Services to Family Options.

On March 10, 2000, the court entered an Order directing Dr. Paul Vianna and the custodian of records at Overlook Hospital to appear for oral depositions on March 17, 2000, and to bring all of plaintiff's records and reports. Another Order was entered on March 14, 2000, which specified a time deadline for the exchange of experts' reports and also set a new deposition schedule. On March 15, 2000, Family Options, filed a motion to extend the time for depositions, and another motion seeking a protective order so that any and all information regarding this matter be sealed. On March 17, 2000, Family Options filed a motion to disallow the expert testimony of Marie Shukaitis and to adjourn the March 22, 2000 trial date.

After hearing argument, the court entered an Order, on March 20, 2000, scheduling further depositions; specifying deadlines for exchange of expert reports; and rescheduling the trial to begin on March 27, 2000. Regarding the motion to disqualify Marie Shukaitis, the court was of the opinion

that it could not hear the motion as it would be the trier of fact, and, given the substance of the motion, confidential information in the nature of attorney-client or work-product information might be revealed. Therefore, this court arranged for the motion to be heard by another judge. On March 20, 2000, after hearing argument and taking testimony, Judge Issenman entered an Order denying the application to disqualify Marie Shukaitis. Also on that date, a Consent Order was entered providing that: the court proceedings for the current litigation would be closed to the public; all court files regarding this matter are to be sealed; and that all parties and counsel are prohibited from revealing the identity of any party or parties or any information which would lead to the identity of any parties within this matter.

On March 26, 2000, plaintiff filed a motion alleging that Family Options had no authority to facilitate the adoption at issue because its corporate charter was revoked.

The trial began on March 27, 2000, and lasted thirteen days, over the period from March 27, 2000 through April 17, 2000. Plaintiff called the following witnesses: plaintiff; Doctor Vianna, plaintiff's primary care physician; Gerry McKnight, RN, plaintiff's nurse in the hospital; Tara Murray, plaintiff's sister; Larisa Minchin, RN, plaintiff's nurse in the hospital; Alexandra Murray, plaintiff's mother; Dr. Rotenberg, plaintiff's expert; and Marie Shukaitis, plaintiff's expert. Family Options called the following witnesses: Christine Letizia, the social worker from Family Options; Eugenia Pankow, defendant's expert; Dr. Karen D. Wells, defendant's expert; and Diane Propert, the director of Family Options. The Bonannos called Edward R. Bonanno; and

portions of Peggy Bonanno's deposition testimony were read into the record upon the consent of all parties at the request of Baby A's counsel.

The following items were placed into evidence by plaintiff: P-1, photographs of plaintiff and her family at the hospital after Baby A's birth; P-7, the curriculum vitae of Marie Shukaitis; P-8, Marie Shukaitis' report; P-9, the curriculum vitae of Dr. Allan Rotenberg; P-10, Dr. Rotenberg's report; P-11, Dr. Rotenberg's handwritten notes of sessions with plaintiff; P-12, Ms. Letizia's handwritten notes of her interaction with plaintiff; P-13, plaintiff's handwritten note to her mother regarding her pregnancy; P-14, Family Options' Certificate of Revocation of Corporate Status; P-17, surrender of custody and consent for adoption form; P-19, plaintiff's PSAT results; P-20, plaintiff's November 1997 SAT results; P-21, plaintiff's December 1996 SAT results; P-22, Ocean County Area phonebook pages on child care providers; P-23, plaintiff's January 29, 2000 phone bill; and P-24, Baby A's medical report, dated January 18, 2000.

The following items were placed into evidence by Family Options: DFO-1 through 5, photographs; DFO-6, book entitled "Saying Goodbye to a Baby"; DFO-7, Family Options pamphlet; DFO-8, a birth mother's medical history form; DFO-9, a birth mother's authorization for release of confidential HIV related information form; DFO-10, a temporary custody agreement; DFO-11, a birth parent's foster care placement agreement; DFO-12, a birth parent post-placement information release; DFO-13, a birth mother's medical coverage form; DFO-14, an affidavit; DFO-15, a provisions of counseling form; DFO-16, a birth

parent's affidavit regarding legal representation; DFO-17, an affidavit of the surrendering parent; DFO-18, a birth mother's affidavit regarding birth father; DFO-19, a surrender of custody and consent for adoption form; DFO-20, Family Options handwritten notes; DFO-22, birth parent contact sheet; DFO-23, birth parent information; DFO-24, pregnancy history for this child and birth history form; DFO-25, discharge instructions; DFO-26, Overlook Hospital birth certificate release form and birth certificate; DFO-27, adoption medical history form; DFO-38, plaintiff's Seton Hall transcript; DFO-40, Dr.Vianna's records; DFO-41, Overlook Hospital records; DFO-42, Eugenia Pankow's opinion; DFO-43, Dr. Karen Wells' opinion; DFO-45, Family Options December 28, 1999 telephone bill; DFO-46, Christine Letizia's business card; DFO-47, birth parent resources and option sheet; and DFO-48, Dr. Karen Wells' supplemental report.

The Applicable Statute

This case is brought by a birth mother who surrendered her newborn baby for adoption but now seeks to set aside the surrender. The central issue is whether, under *N.J.S.A.* 9:3-41a, the birth mother's consent to surrender the baby should be set aside. The statute reads as follows:

> Surrender of a child to an approved agency for the purpose of adoption, other than a surrender taken in accordance with P.L.1955, c. 232 (C. 9:2-13 et seq.), shall be by a signed instrument acknowledged by the person executing the instrument before an officer authorized to take

> acknowledgements or proofs in the State in which the instrument is executed. Prior to the execution of the surrender, the approved agency shall, directly or through its agent, inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and child. The approved agency shall advise the parent that the surrender shall constitute relinquishment of the person's parental rights in or guardianship or custody of the child named therein and consent by the person to adoption of the child. The approved agency shall offer counseling to the parent, prior to the execution of the surrender. The surrender shall be valid and binding without regard to the age of the person executing the surrender and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency. The surrender taken pursuant to this section shall be valid whether acknowledged in this State pursuant to section 1 of P.L.1991, c. 308 (R.S. 46:14-2.1) or acknowledged in another state or country pursuant to section 1 of P.L.1991, c. 308 (R.S. 46:14-6.1).

Therefore, for a surrender to be valid, binding and irrevocable under the statute, it must meet six basic requirements:

(1) it must have been given to an approved agency; (2) it must have been signed by the person surrendering his/her child; (3) it must have been acknowledged by an individual authorized to take acknowledgments in the State of execution; (4) prior to the execution, the adoption agency or its agents must have told the surrendering parent that the surrender document is a "surrender of parental rights" and it means the "permanent end of the relationship and all contact" between the parent and the child; (5) the agency must have informed the surrendering parent that the surrender constitutes a "relinquishment" of the parent's rights to the child; and (6) prior to the execution, the agency must have offered counseling to the surrendering parents. Once these requirements are met, the surrender is irrevocable, except at the agency's discretion or "upon order or judgement of a court of competent jurisdiction setting side such surrender upon proof of fraud, duress or misrepresentation by the approved agency."

The Burden of Persuasion

The parties raised the issue of who, in the current litigation, has the burden of persuasion and what is the standard of proof. Plaintiff argues defendant, Family Options, has the burden of proving there was no duress. Defendant argues that plaintiff must prove duress by clear and convincing evidence.

The "burden of persuasion" is defined as "the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable

doubt, as the case may be." *See* Biunno, *Current N.J. Rules of Evidence*, *N.J.R.E.* 101(b)(1).

The burden of persuasion has been recognized as something that varies "depending upon the type of proceeding, the comparative interests of the parties, the relative litigational strengths or weaknesses of the parties, the access of the parties to proof, and the objectives to be served by the evidence in the context of the particular proceeding." *See Romano v. Kimmelman*, 96 *N.J.* 66, 89 (1984). Further, the burden of persuasion is generally imposed upon the party best able to satisfy it due to the party's "greater expertise and access to the relevant information." *See J.E. on Behalf of G.E. v. State*, 131 *N.J.* 552, 569-70 (1993). It appears that all parties have a serious and deep interest in the case, and none possess a greater or lesser litigational strength or weakness. However, plaintiff is in a slightly better position to prove duress, as it was her will that was allegedly "overborne."

It should be noted that "the allocation of burdens is not [normally] embodied in statutory law but is a decision reserved for the courts." *See Matter of Will of Smith*, 108 *N.J.* 257, 264 (1987). In civil proceedings, the general rule is that "the party asserting a claim has the burden to prove it." *WCI-Westinghouse, Inc. v. Edison Tp.*, 7 *N.J. Tax* 610, 630 (Tax Ct. 1985). New Jersey cases have held that "the burden of establishing the existence of a fact or circumstance is on the party relying thereon." *See Snyder v. I. Jay Realty Co.*, 53 *N.J. Super.* 336, 347 (App. Div. 1958); *Monsen Engineering Co. v. Tami-Githens, Inc.*, 219 *N.J. Super.* 241, 250 (App. Div. 1987).

Appendix B

There are two main court-created exceptions to the general "allocation of burden" rules outlined above. The first exception pertains to public concerns.[1] Clearly, there are public policy concerns where the future of a child is involved. There is strong public policy which promotes the sanctity of parenthood and a natural parent's right to raise his/her child. There is also strong public policy favoring the finality of adoption so that adoptive parents can be confident in knowing that they have assumed the role of the child's parents and the adopted child can grow up in a stable environment. The policy promoting the sanctity of parenthood supports plaintiff's argument that the burden shifts to Family Options to prove that, throughout its dealings with plaintiff, it acted properly. The policy promoting finality of adoption supports defendants' position that plaintiff has the burden of proving duress. There is a constitutional foundation supporting the right to parent a child. However, this right can be counterbalanced by the best interest of the child, embodied in the policy favoring the finality of adoption. Policy considerations, then, are not determinative of the issue.

---

1. The public policy concerns, which may affect the burden in particular cases, including those "favoring the settlement of disputes prior to litigation; favoring access to public documents; favoring shareholder access to corporate information; favoring the development of certain products (e.g., beneficial drugs); requiring a person in a position of trust to justify apparent self-dealing; favoring policyholders over insurers; disfavoring non-conforming zoning uses; disfavoring tort actions against public entities; and favoring the protection of children in family matters." *See* Biunno, *Current N.J. Rules of Evidence*, comment 1 on *N.J.R.E.* 101(b)(1).

The second exception, access to relevant facts[2], frequently results in "the burden being placed on the party in a better position to have access to the facts which are relevant to the disputed issue." *See* Biunno, *Current N.J. Rules of Evidence*, comment 1 on *N.J.R.E.* 101(b)(1). Once again, it appears that plaintiff would have somewhat better access to the facts relevant to her duress claim, as she is the party alleging that her will was overborne, and that, coupled with the ability to have full and complete discovery from the defendants would argue for the burden to be placed upon plaintiff.

Plaintiff argues that a surrender case is similar to an inter vivos transfer, and thus, according to existing case law in that area, Family Options, as the donee, would have the burden of proving duress. *See Bronson v. Bronson*, 218 *N.J. Super.* 389 (App. Div. 1987). This court notes that the cases cited in *Bronson* are distinguishable from the current litigation. First, the *Bronson* case deals with undue influence. The current litigation involves a claim of duress, not an undue influence claim. *N.J.S.A.* 9:3-41a provides relief upon "proof of fraud, duress, or misrepresentation," not undue influence. Second, plaintiff's cases involve situations between individuals, whereas the current litigation involves a licensed adoption agency, subject to various state regulations. Third, in the cases plaintiff relies upon the action arose from gifts and testamentary disposition, and the donor or testator is generally no longer alive at the time of the court proceeding. To the contrary, the parties in the current litigation are alive and available to testify to the facts surrounding the surrender.

---

2. The access to relevant facts exception appears primarily in tort actions, such as malpractice cases. *See* Biunno, *Current N.J. Rules of Evidence*, comment 1 on *N.J.R.E.* 101(b)(1).

Appendix B

In addition, in the cases upon which plaintiff relies, the relationship between the parties is one in which they are either friends, family members, or in which one rightfully reposes confidence in the other. Neither "friendship" nor a familial relationship were ever present in the current litigation. At all times throughout their relationship, Family Options and plaintiff had only a professional agency relationship. There was no more "confidence" reposed in this agency than one would repose in any professional who provides a service.

The case law cited by plaintiff holds that if the donee has superior knowledge as to a transaction and the detriment that may be suffered by the donor, and if the donor engages in the transaction and fails to appreciate the donee's superior knowledge, the transaction should be voidable at the request of the donor, or his representatives. *See Bronson v. Bronson*, 218 *N.J. Super.* 389 (App. Div. 1987). Clearly, Family Options had greater knowledge about the intricacies of adoption. However, it is equally clear that on January 19 and 21, 2000, plaintiff knew very well the nature of adoption and the finality of her action. She appreciated Family Options' knowledge in the field. Plaintiff also knew the consequences of the surrender. If the court were to adopt plaintiff's argument, in every case in which a client were to sue his professional service provider, the burden would be shifted. There is no support for that proposition.

Finally, *N.J.S.A.* 9:3-41a states that "[t]he surrender shall be valid and binding without regard to the age of the person executing the surrender and shall be irrevocable except at the discretion of the approved agency taking such surrender

or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency." *See N.J.S.A.* 9:3-41a. Implicit in the statutory language is that the burden is placed on the party raising the duress, fraud or misrepresentation claim. Nothing in the statutory language shifts the burden from the party alleging the fraud, duress or misrepresentation to the other party to prove the lack thereof.

Therefore, considering the Rules of Evidence, case law, the statutory language, and public policy concerns, the court finds that plaintiff has the burden of persuasion.

The Standard of Proof

The next issue raised by the parties is what should be the standard of proof in this case. The preponderance of the evidence standard is normally applicable when "the claim being advanced is not one which is either unusually subject to deception or disfavored by the law. In the absence of one of those elements, it is generally held that the preponderance standard is adequate." *See* Biunno, *Current N.J. Rules of Evidence*, comment 1 on *N.J.R.E.* 101(b)(1); *State v. Sheppard*, 197 *N.J. Super.* 411, 440-41 (Law Div. 1984).

Although contesting the surrender of a child based on duress may be something which is subject to deception, there is no evidence that it is unusually so. The parties to such a case are generally alive and available at the time of trial and there are statutory prerequisites and administrative regulations clearly set forth which control a surrender and which can be examined at trial.

Appendix B

Contesting the surrender of a child for adoption is not disfavored where fraud, duress or misrepresentation can be proven. In fact, the strong constitutional rights of parents would support the avenue of relief. Therefore, the court finds that neither of those exceptions apply to the current litigation, as challenging an individual's surrender of her parental rights to an agency is not unusually subject to deception or disfavored by law where fraud, duress or misrepresentation is alleged.

There are also public policy considerations which must be weighed in reaching a conclusion on which standard should apply. "All inquiries that bear on whether parental rights may be terminated must be considered in light of the extraordinarily strong protections that surround those rights. The right of a biological parent to enjoy a relationship with his or her child is fundamental and constitutionally protected." *See Matter of the Adoption of a Child by D.M.H. and S.H.*, 135 *N.J.* 473, 480 (1994). Therefore, before a biological parent's rights will be terminated, strict standards must be satisfied. *See Matter of the Adoption of a Child by D.M.H. and S.H., supra*, 135 *N.J.* at 481. Likewise, the finality of the surrender is favored. Existing case law provides that if experienced, non-profit associations "are to function under the statute, they must be in a position to plan for the child without interference, in the absence of any unfair dealing or poor judgment adversely affecting the custody of the infant." *See Lavigne v. Family & Children's Soc'y of Elizabeth*, 11 *N.J.* 473 (1953).

While a parent's right to a relationship with his or her child is constitutionally protected, the adoptive parent's right to finality of the adoption flows from the best interests of the child, which has received great protection by the courts.

Given the strong competing interests, the public policy considerations do not produce a clear result as to what standard of proof should be applied in this current litigation.

The court found no reported New Jersey case law on point.[3] An action seeking an involuntary surrender would require clear and convincing evidence before parental rights could be terminated; however, that standard has not been held applicable in the case of a knowing and voluntary surrender. Here, the question is whether the clear and convincing standard should be held to apply in an action to set aside a prior voluntary surrender of parental rights.

The clear and convincing standard was initially used in cases involving claims under the Statute of Wills, the Statute of Frauds or the Parole Evidence Rule due to concerns that such claims would frequently be fabricated. *See Herman & MacLean v. Huddleston*, 459 *U.S.* 375, 388, n. 27 (1983). The current litigation can be distinguished from the aforementioned cases. An adoption agency follows strict regulation and its documents are detailed, witnessed and notarized. Such regulations and strict standards make it more difficult to fabricate facts surrounding an agency surrender.

---

3. The court notes that in involuntary termination of parental rights cases, the burden used is clear and convincing evidence. *See Santosky v. Kramer*, 455 *U.S.* 745, 769 (1982). In addition, the court recognizes that three jurisdictions employ the clear and convincing standard in cases similar to the current litigation. *See Meza v. Rodriguez*, 305 *Ill.App.3d* 777 (1999); *William D. v. Shawna Renee A.*, 1999 WL 1188850 (W.Va.); and *In the Matter of a Female Child*, 938 *P.2d* 1184 (Hi. 1997). However, such is statutorily mandated in West Virginia and required by case law in Illinois and Hawaii. The Illinois and Hawaii courts do not provide any guidance as to the reasons for its use of the clear and convincing standard.

Appendix B

The clear and convincing standard has also been used where "the adverse party is at a gross disadvantage in disputing an allegation, in order to 'restore a fair balance between the adversarial position of the parties.' " *See State v. Sugar*, 200 *N.J.* 214, 239-40 (1985). Clearly, none of the parties here are at a gross disadvantage, as all parties are equally available.

The court deems it significant that the Legislature, in *N.J.S.A.* 9:3-41a, did not set a particular standard of proof. Rather, the statute merely states that a surrender is valid and irrevocable unless there is "proof or duress, fraud or misrepresentation by the approved agency." *See N.J.S.A.* 9:3-41a. The statute was amended in 1993, yet the standard of proof issue was never addressed. If the Legislature thought that a particular standard of proof was necessary to protect a party's rights either because there were public policy issues warranting such or if it felt that this area was "fraught with deception," it would have specified the clear and convincing standard. However, the Legislature never made such a specification.

In analyzing the question posed, the court looked for possible analogous situations. In doing so, it compared the revocation of consent to a voluntary surrender to an application for post-conviction relief. An individual seeks post-conviction relief does so to vindicate constitutional rights. When such individual seeks such relief, the standard is preponderance of the evidence. *See*, e.g., *State v. Zold*, 105 *N.J. Super.* 194, 203 (Law Div. 1969), aff'd o.b. 110 *N.J. Super.* 33 (App. Div.), certif. den. 57 *N.J.* 131 (1970). Clearly, seeking to withdraw one's voluntary consent to the

adoption of his or her child is analogous to one seeking post-conviction relief. Each case involves serious constitutional rights which they seek to have restored.

Based on the Rules of Evidence, case law, public policy concerns and the statutory language, the court concludes that in order to void the surrender at issue, plaintiff must prove, by a preponderance of the evidence, that the surrender documents were signed due to fraud, duress or misrepresentation by Family Options.

Credibility

In large measure, this case turns on the findings of fact which are set forth below. These findings were made after an assessment of the credibility of the witnesses. In the court's view, there were four major fact witnesses: the plaintiff; her mother; Mrs. Murray; Christine Letizia; and Diane Propert. Each of these fact witnesses is personally and heavily invested in the outcome of the case. Plaintiff seeks to have the child returned to her, plaintiff's mother wishes her daughter to be happy, and the agency is concerned about potential liability and its integrity as an agency.

The court finds that none of the parties looked back totally objectively on the events at issue. The plaintiff's demeanor was at times emotional, angry, immature and petulant. She is grossly dissatisfied with the surrender for which she blames the agency, and that sentiment came through loud and clear in her testimony. Mrs. Murray's testimony at times evidenced anger and emotion. Her testimony indicates that she is angry that she trusted the

representatives of the agency and their opinions, and that her daughter was not satisfied with the outcome. She was emotional, as any mother would be, and concerned about her daughter's happiness. The Murrays' testimony, therefore, was not and cannot be taken at face value.

Likewise, however, the court did not and cannot accept Mrs. Letizia and Mrs. Propert's testimony at face value. Mrs. Letizias' direct testimony was confident, highly detailed and energetic. However, on cross-examination, it appears that many of the conclusions and statements given to the experts by her demonstrate assumptions and characterizations she made, which were sometimes overblown. Mrs. Propert's testimony was soft in tone, yet defensive, and, at times, self-righteous.

The court found all the parties at times over-dramatized, simplified or omitted facts which either helped or hurt their positions. Each party is looking at the incident with a totally different perspective. It is not surprising, therefore, that their testimony concerning certain things differed. The court has, however, weighed each of these perspectives.

The court, therefore, did not adopt totally either parties' view of the facts. Instead, the court looked at the testimony of all the parties and attempted to discern the facts. In reaching its conclusions, the court did not rely solely on the demeanor of any of the fact witnesses, but rather considered the parties' testimony, their biases and the consistency of their testimony, as well as how their testimony squared with known objective facts.

Appendix B

With respect to the expert testimony, the court found the experts in adoption agency procedures failed to have provided any substantial insight, other than to direct the court to the appropriate New Jersey Administrative Code Regulations concerning agencies, and to assist in outlining the limits of agency efforts in providing references and resources for options other than adoption. With respect to Dr. Rotenberg and Dr. Wells, the court again notes that each party's expert opinion was based primarily on the facts and information provided by their respective sides, and hence, were somewhat colored by that. However, the court did find that Dr. Wells' opinion, in comparison to Dr. Rotenberg's opinion, was somewhat more well-founded and supportable.

Therefore, the court, utilizing the preponderance of the evidence standard, sets forth its findings of fact as it discerned them.

Findings of Fact

The central person in this dispute is Brooke J. Murray, the natural mother of Baby A. Brooke Murray was born on November 13, 1980, and is nineteen years of age. She grew up in a single family home, together with her mother and her sister, who is approximately two years older. Plaintiff's parents were divorced more than fifteen years ago, and she has had little, if any, contact with her father and no financial support from him. Plaintiff attended and graduated from Mount St. Mary's Academy, a private, all girl Catholic high school. She received primarily A's and B's in high school and was a member of the National Honor Society in her junior year. She was active in clubs and some recreational athletic

activities. Upon graduation, she enrolled in Delaware Valley College in Pennsylvania, where she received primarily B's and C's during her first year. At Delaware Valley College, she was elected a dormitory counselor by her peers.

During her first year in college she experienced some adjustment problems. She received counseling and assistance from her primary physician, Dr. Vianna. It is clear from the record that she made the decision, somewhere toward the end of her first year in college that she wished to transfer back to a local college and live at home. Accordingly, in the Fall of 1999, she enrolled in Seton Hall University. She has lived at home since the Spring of 1999. After coming home from Delaware Valley College, Plaintiff worked three days a week at a local restaurant and attended classes full time at Seton Hall. During her first semester at Seton Hall, she received four B's and two C's. During this time, her older sister, Tara, a senior in college, was boarding at Boston University, where she had been living during her last four years of college.

Plaintiff has had no prior involvement with the law nor has she ever been disciplined at any time while she was in school. She has had no prior psychiatric or psychological treatment during her life, nor hasshe received treatment from a psychologist or a psychiatrist at any time during the period giving rise to the current litigation.

She enjoyed a good relationship with her mother. While she discusses many issues with her mother, there are a number of issues that she chooses not to discuss with her mother. Her relationship with her sister has been an evolving

one. While they presently enjoy a good relationship, in the past they seemed to go their separate ways and confide more in friends then in one another.

Mrs. Murray, plaintiff's mother, is a native of Austria. She has been in the United States since 1968. For the past fifteen years, she has been gainfully employed as a bookkeeper and office manager. She has been the primary financial support for plaintiff and Tara.

On February 5, 1999, as a result of her adjustment difficulties at Delaware Valley College, plaintiff contacted her primary care physician, Dr. Vianna, and complained to him about difficulty focusing, concentrating and similar ailments. At that time, the doctor prescribed Effecor. After approximately four weeks on that medication, plaintiff again contacted the doctor, who prescribed an increased amount of Effecor for the next four weeks. Sometime in early April 1999, plaintiff discontinued the use of that medication.

For the two years prior, plaintiff had complained to the doctor about highly irregular menstrual periods. She pointed out to the doctor that she would menstruate only one or two times a year. The doctor wished to do further studies, but at the time he was concerned because plaintiff did not have medical insurance to permit him to do the appropriate tests. An M.R.I. test would have been quite expensive. According to his testimony, the doctor stated that when he examined her, he regularly asked her whether she was sexually active or if she used drugs or alcohol. The doctor testified that she repeatedly answered such questions in the negative.

Appendix B

In April 1999, while at a club in New York City at which alcohol was served, plaintiff, then eighteen years old, met an individual named Mosha. She has never learned his last name. He is in his early forties. They met approximately four times: once at the club; twice at Mosha's friend's apartment; and once at his apartment. During a trip to his apartment in April 1999, they engaged in sexual intercourse. According to plaintiff, Mosha's friend had left the apartment for a while, and her girlfriend was in the bathroom when this activity took place in the living room. Plaintiff said she did not wish him to continue and that he had advised her "I didn't cum inside you". She believed him. No birth control was used. She said from that time forward she engaged in no other sexual activity.

Plaintiff reports that while she gained some weight during the summer, she thought it was because she was working three nights a week at a restaurant and was eating foods that she normally would not eat.

On August 24, 1999, plaintiff visited Dr. Vianna to have school forms filled out and to receive some vaccinations. The doctor did a cursory examination and asked her how she was doing. She again identified a problem of not having her period. The doctor asked about sexual activity, to which she responded no, and given her prior history, the doctor took no further action. Approximately two weeks later, in September 1999, plaintiff again visited the doctor and complained of missed periods and mood swings. Again, the doctor made the same inquiries. Based on the response that there was no sexual activity and her prior history of missed periods, the doctor concluded that she was perhaps suffering

from a pituitary problem. The doctor suggested further blood work and, if necessary, further testing when medical insurance became available to her.

In October 1999, blood work was done and vitamins were prescribed, and based upon the blood work, it was determined that plaintiff had a high prolactin level. Again, the doctor concluded that while this would be normal in a person who is pregnant, based on his knowledge of plaintiff's prior history of missed periods and her negative response to sexual activity, he scheduled an M.R.I. to explore whether she suffered from a pituitary adenoma. The M.R.I. was on November 3, 1999. The results, which were received on November 10, 1999, revealed that her pituitary condition was normal.

During Thanksgiving week, plaintiff complained of intestinal and stomach problems. Following Thanksgiving, her mother examined her and suggested that she may be pregnant. Plaintiff dismissed that possibility on the belief that she had not engaged in any sexual activity which would have led to pregnancy in the recent past, and therefore, pregnancy was out of the question. However, on November 29, 1999, plaintiff went to Dr. Vianna's office. After an examination, the doctor quickly concluded that not only was plaintiff pregnant, but she was between thirty and thirty-four weeks along in her pregnancy. When the doctor announced his findings to plaintiff, she was upset, protested that this could not be possible, and stated that she had no idea what to do.

The doctor, an internist and not an obstetrician/ gynecologist, called another doctor to make a referral.

The doctor then advised plaintiff that since she was so far along, abortion was out of the question. Plaintiff began to consider and articulate that perhaps adoption would be the best route. To gain more information, Dr. Vianna called Dr. Paternoster, a fellow professional who had adopted a child. Dr. Paternoster advised Dr. Vianna that he knew of a couple, "Nick and Elena," who were interested in adoption and had a home study done through defendant, Family Options. He suggested, therefore, that perhaps plaintiff may wish to get in touch with that agency.

Dr. Vianna gave plaintiff various telephone numbers for her to explore. Plaintiff had never been pregnant before so everything that was occurring was new to her. Dr. Vianna advised her that perhaps adoption would be an option. He also suggested that if she chose adoption, she should not see the baby or know its sex. It might be easier he said simply to allow the adoption agency to take the baby from the hospital.

Dr. Vianna did not make any referral to a psychologist or a psychiatrist for plaintiff. He did tell her not to feel pressured in her decision. The doctor then arranged for her to be seen by an obstetrician/gynecologist, whom she did see that day, and who advised her that her due date was approximately January 30, 2000.

On November 30, 1999, plaintiff made approximately six telephone calls to the various numbers given to her by Dr. Vianna and his staff. Her testimony was that none of the agencies could provide her with help. She said she also looked on the Internet for information regarding adoption.

Appendix B

On December 1, 1999, plaintiff told her mother about her pregnancy. She did it by leaving a note for her mother (P-13 in evidence). When plaintiff returned from working at the restaurant that night, her mother was home and had read the note. Her mother simply hugged her and advised her that they would work it out. From that time forward, she and her mother had almost daily conversations about her pregnancy and what to do about it. Plaintiff was convinced, at that time, that there was no way that she could keep the child while going to school, especially given her inexperience as a parent and financial limitations. She also knew that abortion was not a viable alternative, since she was now approximately thirty-two weeks pregnant.

Also, on December 1, 1999, Dr. Vianna contacted Mrs. Letizia from Family Options. Dr. Vianna told Mrs. Letizia about his patient and gave her plaintiff's name and said she was considering adoption. The doctor also urged that plaintiff get counseling and support from this agency.

On December 2, 1999, Mrs. Letizia received a call from Nick and Elena, prospective adoptive parents, urging her to act quickly with respect to plaintiff's pregnancy. Mrs. Letizia had conducted the home study with respect to Nick and Elena.

Mrs. Letizia spoke by phone to plaintiff on December 2, 1999. She identified herself and explained to plaintiff that she was with a licensed adoption agency, and went through the various options available to plaintiff. She spoke to plaintiff about surrender, about the legal process, and gave plaintiff other phone numbers where she could be reached. Mrs. Letizia told plaintiff about an after-placement support group, and also spoke to her mother.

Appendix B

On December 3, 1999, plaintiff called Mrs. Letizia with a number of questions. During the conversation, they spoke again about options and plaintiff sought phone numbers for adoptive and birth mothers that she could speak with. Many of the questions related to the level of openness that could occur in an adoption. Plaintiff explained to Mrs. Letizia that it was difficult for her to parent, that there was no one in the family who could help her and that there were no family foster care options available. A face-to-face meeting between plaintiff and Mrs. Letizia was to be set up.

On December 8, 1999, Nick called Mrs. Letizia seeking a meeting with plaintiff. On December 9, 1999, plaintiff called Mrs. Letizia and agreed to a meeting with plaintiff, her mother and Mrs. Letizia. During this phone call, they again spoke about foster care, adoption, open adoption issues, why plaintiff felt she could not parent the child at this time and how upset she felt about her inability to do so. Plaintiff was told on December 9, 1999, that Mrs. Letizia and the agency would help regardless of whether she decided on adoption.

On December 11, 1999, Mrs. Letizia met with plaintiff and Mrs. Murray at their home for approximately two hours. Plaintiff had a pad on which she had written down a lot of information taken off the Internet.

Mrs. Letizia gave the Murrays an overview of the agency, the home study process, and explained that the couples they would be looking at as potential adoptive parents had already had successful home studies done. They talked about plaintiff parenting and her school and work activities, and it was

decided that, while she might like to parent, it did not seem possible given her commitment to completing school on time and her desire to travel. There were no immediate family members who could help. The meeting primarily focused on the level of openness plaintiff wanted in an adoption.

At this meeting, Mrs. Letizia left plaintiff with a book entitled "Saying Goodbye to a Baby," (DFO-6), a pamphlet about the agency, (DFO-7), and a number of other documents, including the surrender documents. Mrs. Letizia explained that the book would be very difficult and emotional to read, but it would be helpful. An authorization for release of medical information, (DFO-8), and an authorization for release of confidential HIV related information, (DFO-9), were reviewed and executed at the December 11, 1999 meeting.

The following documents were also left with plaintiff on December 11, 1999: a birth parent post-placement information release, (DFO-12); a birth mother medical coverage form, (DFO-13); a provisions of counseling form, (DFO-15); an affidavit of surrendering parent, (DFO-17); a surrender of custody and consent for adoption, (DFO-19); an adoption medical history form, (DFO-27); and a birth parent resources and options form, (DFO-47). The above-listed documents, other then DFO-8 and DFO-9, which were signed on that date, were discussed and reviewed, but were not signed or filled out. Plaintiff acknowledges receipt of these forms on that date, but claims she only skimmed them and put them aside.

The discussion on December 11, 1999, also touched on the identity of the birth father. Questions about him were

rebuffed and plaintiff stated she did not wish to identify him. The parties also talked about financial needs and picking an appropriate hospital. Mrs. Murray made it clear that she would be responsible for her daughter's financial needs, and therefore, did not want that to become an issue which would pressure her daughter into taking a particular course of action.

Mrs. Murray was concerned with her daughter's level of maturity and her present stage of life. While Mrs. Murray favored adoption, she did not articulate her feelings to her daughter, because she wanted this to be her daughter's decision alone. Mrs. Murray was concerned about foster care, which she considered a government institution and she did not wish to have the government involved in raising the baby.

Finally, the parties reviewed Nick and Elena's adoption portfolio. The discussion did not focus heavily on parenting since, given her current thinking, plaintiff did not see that as a viable option. Mrs. Letizia did tell plaintiff that if she wanted to discuss parenting, they could do so at any time.

On December 11, 1999, Mrs. Letizia called Nick and Elena to advise them of the meeting between the parties. Mrs. Letizia believes that she was serving two clients in this matter, Nick and Elena, as well as plaintiff. Mrs. Letizia did not see any conflict in that arrangement, nor is there any regulatory prohibition on this practice.

Also, on December 11, 1999, Mrs. Letizia called plaintiff to see if she had any questions regarding their meeting. Most of plaintiff's questions dealt with the level of open adoption that would be available. There was a question raised by Mrs.

Letizia as to whether there was anyone in plaintiff's family who would be interested in adopting the child. She was told no. She also discussed with plaintiff her feelings of selfishness because she was not prepared to parent given her current commitments. The timing of the next meeting, at which time plaintiff could meet with Nick and Elena, was discussed. Plaintiff wanted the meeting after Christmas so her exams would be finished.

On December 13, 1999, there were telephone calls between Mrs. Letizia and plaintiff regarding adoption, her job, and parenting issues. Plaintiff continued to receive medical care. On or about December 17, 1999, plaintiff was informed that the child she was carrying was a girl. Another telephone call, on December 17, 1999, again dealt with general issues regarding adoptions and plaintiff's state of mind. During a telephone conversation on December 21, 1999, the date on which plaintiff would meet Nick and Elena was discussed. It was agreed that the meeting would occur at the Family Options office on December 27, 1999. Mrs. Letizia spoke to plaintiff about the type of questions she may want to ask and told her that she may want to make a list of those questions so she would not forget to ask them when they met.

On or about December 22, 1999, plaintiff's sister, Tara, arrived home from college for the holiday break. When she learned of her sister's pregnancy from their mother, she did not speak to her sister for the next few days, and when she did, she asked her how she could be so stupid. It was not until Christmas that they began to speak at all. Her sister did point out to plaintiff the lifestyle changes that would be involved in parenting a child.

Appendix B

By this point in time, plaintiff had finished her first semester work, her exams were over, and she had stopped working at the restaurant. From December 22, 1999 through January 10, 2000, plaintiff primarily watched television at home. During this period, she made no telephone calls or other efforts on her own to explore her options. She did, however, continue to talk with her mother and her sister.

On December 24, 1999, Mrs. Letizia spoke with Mrs. Murray, who stated that her preference was to have her daughter have the baby, leave the hospital, and get on with her life. She also spoke about the advantages of adoption for her daughter. She was concerned that her daughter would not have the ability to parent a child. She again refused to convey her feelings to plaintiff directly since she did not want to be accused of telling her what to do.

On December 27, 1999, a meeting took place at Family Options, at which time plaintiff and her mother met Nick and Elena. An interview was held and questions were asked. The parties asked many questions. Mrs. Letizia again reviewed, generally, the options available to plaintiff — parenting, foster care or adoption.

Up until this meeting, it is apparent, and plaintiff so testified, that any thoughts she had of parenting were quickly dismissed by her. She did not think she was ready to parent and did not visualize herself parenting, as she was committed to finishing school on time. It is clear from all of the testimony that, throughout the matter, her mother favored adoption, but did not tell her daughter what to do for fear of alienating her if her daughter took her advice and later wished

she had not. It is also clear that Family Options outlined various options, including parenting, foster care and adoption, but that the only option that received any detailed explanation was adoption. Family Options' focus throughout the first month of contact was not only on adoption, but on a specific placement with Nick and Elena. While general references to foster care, family adoption, and day care were made, the level of detail was significantly less with respect to these options than with respect to adoption.

On January 5, 2000, plaintiff called Mrs. Letizia and reviewed her health. She stated that she was anxious about having the baby because her classes were to resume on January 13, 2000, and she hoped she would not miss many classes. She also said that her sister would like to meet with Nick and Elena before she returned to college. A meeting with Nick and Elena was tentatively set for January 8, 2000, at a restaurant in Springfield, New Jersey. On January 8, 2000, that meeting was canceled because Mrs. Letizia had the flu. The meeting was tentatively rescheduled for January 12, 2000.

On January 10, 2000, plaintiff went to her gynecologist for a medical check-up. The doctor was quite concerned with her elevated blood pressure, and thus, had her admitted to the hospital late that evening with labor to be induced the next day. On January 11, 2000, plaintiff contacted Mrs. Letizia and advised her of the recent developments. Plaintiff requested that Elena be notified so that she could call plaintiff directly. Plaintiff said she would like to have Elena at the hospital. Nick and Elena then came to the hospital and waited outside during the birth, which occurred at 2:09 p.m.

The doctor, the nurse, plaintiff and her mother were present during the birth. Plaintiff was crying frequently throughout that day. The baby stayed in her room throughout her hospital stay, except during necessary medical procedures and during a visitation with Nick and Elena. Plaintiff cried almost constantly for more than fourteen hours.

Problems immediately developed between plaintiff and Nick and Elena. Plaintiff found Nick and Elena to be too pushy. They immediately injected who the pediatrician should be. They insisted on visitation. They attempted to take pictures and have family members see the baby. Further, they were quite secretive in giving any personal information about themselves regarding who they were, where they lived or their last name. This greatly upset plaintiff who was hoping for an open adoption. Since she had not yet made a decision, plaintiff felt it was presumptuous of them to start dealing with naming the baby and selecting a pediatrician, while not providing her with any information regarding where they lived or their last name. Phone calls ensued between Nick and Elena and Mrs. Letizia, who finally told them that there would be no more visits. However, that did not stop the aggravation that occurred between the parties on that evening. The nurse attempted to help Nick and Elena obtain pictures and private visitation. Plaintiff was outraged and upset.

On January 12, 2000, Mrs. Letizia came to the hospital. She again met with plaintiff and her mother. It was clear to Mrs. Letizia that there were major problems with any adoption plan involving Nick and Elena. Accordingly, they then had a discussion about how and where the baby would be cared for upon discharge. Discussions again focused on

parenting and foster care. At this time, the Murrays were referred to DYFS and the Board of Social Services in order to obtain names and licensed foster care facilities if they wanted to explore that route. Actual telephone numbers were not provided. A live-in nanny and the option of family members raising the baby were also raised, but with respect to day care, Mrs. Letizia pointed out that she was not aware of any day care in the area that would handle children under six weeks of age. This statement regarding day care availability was later checked out by Mrs. Murray, on January 18, 2000, when she looked in the telephone book, and failed to find any advertisements for agencies which would take a newborn. It was decided that they had a few days left to work this out since the baby would not be going home for a day or two.

Mrs. Letizia advised plaintiff that if she took the child home it would be even more emotionally difficult for her to place the baby for adoption. Mrs. Murray agreed with that thinking as did plaintiff. Based on her feelings, Mrs. Letizia suggested that Family Options take the child so that plaintiff could get back to her normal life and see how she felt during this trial separation.

The nurses and the treating doctor noticed that plaintiff was sad, upset, and constantly crying. It is notable that at no time during her hospital stay or throughout this entire incident did any medical professional recommended a psychological or psychiatric consult. Plaintiff was also upset over the name of the child. Nick and Elena had named the baby Jenna. However, on January 13, 2000, plaintiff chose the name Alanna for the baby. She was specific about that. She engaged in a heated argument with the woman from the Bureau of

Vital Statistics who wanted a resolution on the name. Plaintiff told her to leave her alone and give her more time until she could make up her mind. It is clear that plaintiff and her mother stood up to that woman at that time.

On January 12, 2000, plaintiff said that she did not see how she could give the baby up. However, she also pointed out, though, that with school, her friends and her desire to travel, she was not ready to parent. By January 12 or 13, 2000, she certainly had decided that Nick and Elena would not be the adoptive parents, since their actions, with regard to openness, gave her the clear impression that an open adoption would not work.

On January 13, 2000, plaintiff was discharged from the hospital and arrived home at approximately 10:00 p.m. She was very upset and for the next five to seven days she did not get much sleep, was very emotional and slept in her mother's bed each night, something she had not done since she was a young child. Yet she quickly returned to school and work. On January 13, 2000, Mrs. Letizia received a phone call at home from plaintiff, at which time plaintiff advised her that she is considering her options. It was decided that Mrs. Letizia, plaintiff and Mrs. Murray would meet at plaintiff's home at 9:00 A.M. the following day to review more portfolios. The parties also reviewed the characteristics of candidates for adoptive parents. Plaintiff wanted the adoptive parents to have a satisfactory level of openness, a high level of education, financial security, emotional security, an interest in international travel, languages and be Catholic. On January 14, 2000, Mrs. Letizia arrived at the home and again met with plaintiff and Mrs. Murray.

Parenting issues were once again generally discussed. Plaintiff was very emotional. Plaintiff was told that Alanna would be picked up by Mrs. Letizia and kept by the agency director, that Mrs. Letizia would pick up some clothes for her on the way, and that in order to accomplish this, various papers needed to be signed, including: DFO-10, a temporary custody arrangement; DFO-11, a birth parent's foster care placement agreement; and DFO-12, a birth parent's post-placement information release. Each of the documents was explained to and signed by plaintiff. Plaintiff asked specifically whether these were the final surrender documents, and she was told they were not. However, a new set of surrender documents was given to Ms. Murray at that time. At this time, plaintiff was returning to work and school. Eight more portfolios were then reviewed in the Murray's kitchen. Some were quickly set aside by plaintiff based on religion, looks, or other characteristics. Four remained as possible candidates. It was decided that Mrs. Letizia would attempt to set up interviews with the four couples as soon as possible. Also on this date, Mrs. Letizia informed Nick and Elena that they were no longer going to be considered.

Mrs. Letizia was able to make arrangements to meet with the four couples and the meeting was scheduled to review the candidates at the Family Options office on Saturday, January 15, 2000. Mrs. Murray, her daughter, Tara, and plaintiff came to the interviews, along with Mrs. Letizia and the various candidates. Each interview lasted approximately one-half hour. The third set of parents interviewed were the defendants, the Bonannos. There was a discussion as to whether plaintiff would see the baby that day and Mrs. Letizia said that it would be very emotional for her to see the four

candidates as well as the baby, especially since it was anticipated she would also be speaking to Lori, a birth mother from Spring Lake, New Jersey, to discuss her experiences in placing a child for adoption. Plaintiff did not physically go and see Lori in Spring Lake, but she did have a telephone conference with her and Lori did help her prepare some additional questions for interviews. Mrs. Letizia made it clear to all the candidates that the birth mother had not yet decided what course she was taking, but she wanted to go through with the interviews.

Prior to interviewing the prospective adoptive parents, the parties again generally discussed all the options. Plaintiff was emotional during this meeting. She asked no questions of the candidates. After the meeting, she said she was somewhat interested in two families, but wanted some more questions answered. Mrs. Letizia said she would check out those issues. It was also suggested that another couple, Lynn and Jerry, be interviewed. That interview was scheduled for the following day, Sunday, January 16, 2000. The parties were informed that the current foster care with the agency was short term and that plans would have to be made for longer care unless another decision was reached soon.

Also at the meeting on January 15, 2000, plaintiff states that she brought all of the documents given to her earlier, which she had filled out in the car. The only documents that were signed that day, however, were: DFO-13, a birth mother's medical coverage form, which her mother had a question about since it dealt with medical coverage; DFO-14, an affidavit in which plaintiff refused to name the birth father; and DFO-15, an acknowledgment concerning provisions for

counseling. There was also testimony that Mrs. Murray asked about paragraph eight in DFO-15, which dealt with expenses because she wanted to clarify that no one was paying for her expenses. No other documents were signed that day.

On January 15, 2000, Mrs. Letizia explained that longer term foster care options needed to be dealt with. Mrs. Murray made it clear that she would like that to be explored, and Mrs. Letizia said she would see what she could do regarding Mrs. Murray's request.

On January 16, 2000, the parties again met at Family Options to interview Lynn and Jerry, as well as visit with the baby. This was the first time that plaintiff and Mrs. Murray met with Mrs. Propert, the director of the agency. Mrs. Propert has more than twelve years of adoption counseling experience and a master's degree in counseling. At this time, Mrs. Propert pointed out that she could not keep the child too long — certainly not beyond Saturday morning, January 22, 2000. Mrs. Letizia talked about foster care and about plaintiff taking the child home. It was pointed out, though, that it would be difficult to go out and buy the necessary things to keep the child at home if plaintiff were eventually going to place the child for adoption because she would have these items around the house, which would then cause her emotional upset.

Based on Mrs. Murray's request to explore foster care options, Mrs. Letizia had contacted an acquaintance, Denise Modica, a registered DYFS foster mother, who lives in Barnegat, not far from Mrs. Letizia. She said she would provide foster care for the baby at $75 a day, plus expenses for diapers and

formula. It was agreed between Mrs. Letizia and the Murrays that on Monday January 17, 2000, Mrs. Letizia would transfer the baby from Mrs. Propert to Ms. Modica.

Plaintiff interviewed Lynn and Jerry on January 16, 2000, but the meeting was not particularly satisfactory. At some time during the meeting, Mrs. Murray left to have a cigarette. Mrs. Letizia went out and spoke to her about the need to reach a decision. She pointed out that plaintiff had a "nice thing going." She had the baby and other people were caring for the baby, she was allowed to visit the baby whenever she wanted and she was allowed to take her time to decide what to do while she worked and went to school, yet, she was relieved of any responsibility or obligation for the baby. Mrs. Letizia expressed concern that unless some sort of impetus was brought to bear, the issue may never be resolved. At this time, plaintiff had been back to work and was beginning school.

Over the past month and a half, plaintiff had had an opportunity to discuss the matter with her mother and sister. She also had the opportunity to speak with her Aunt Helen, her friend, Jamie, her godfather, Joe, and Dr. Vianna. Plaintiff had called Dr. Vianna and asked whether she would be able to have children in the future. She also spoke with her obstetrician/gynecologist who told her that having a child and placing it for adoption was a wonderful gift from God. In addition, she had time to make inquiries on the Internet, as well as the opportunity to discuss issues with Mrs. Letizia.

On January 17, 2000, Mrs. Propert decided that it would be less disruptive to the child if she remained with her the

entire week, that is until Saturday, January 22, 2000. Mrs. Letizia advised the Murrays, who were initially upset, but then appreciative of Mrs. Propert's efforts to keep things less disruptive for the baby.

On January 17, 2000, plaintiff began thinking, in earnest, about parenting the child herself. She went on the computer to see if she could change her school schedule to evening classes. If this were possible and her mother could return home immediately after work, then she thought that perhaps they could raise the child themselves. The problem with parenting the child was the "time gap" between when plaintiff would have to leave for class and her mother returned home. This period of time required some sort of child care. Plaintiff was intent on finishing school within four years, and did not consider it in any way beneficial for her to take a semester off until the child was older and day care was more readily available.

Although, she knew that parenting was always an option, she did not pursue it herself, beyond making an inquiry as to how she could change her class schedule. She claims she was convinced by Mrs. Letizia that there was no day care available and she was unwilling to drop out or limit her classes for a period of time. Mrs. Letizia clearly told Plaintiff not that there was no day care, but that she was unaware of any in the area. She did suggest that she call DYFS or the Board of Social Services for agencies that provided day care. Plaintiff apparently did nothing in that regard. She did not look in the phone book or talk to people at Seton Hall, neighbors, friends, or family members about potential babysitters. The concept of a nanny, although briefly touched on by Mrs. Letizia, was not pursued by the family either. At this time,

plaintiff had not settled on the option of adoption or parenting, nor had she come to a conclusion about the prospective adoptive couple.

On January 17, 2000, it was agreed that plaintiff would meet with Lynn and Jerry and the Bonannos at the Mark Twain Diner in Union for further discussions. Plaintiff called Mrs. Letizia on that day to ask questions about terminating her parental rights and her options, which were again briefly reviewed.

On January 18, 2000, a meeting was held at the diner. Plaintiff, along with her mother, interviewed the candidates. Plaintiff had been back to school and discussed her change in schedule with Mrs. Letizia. Her mother explained that she was also trying to work out her schedule. Mrs. Letizia again said she was not aware of any day care for infants in that geographical area. This discussion seemed to be somewhat fleeting and the Murrays did not pursue it with any vigor. When asked if she could speak to any mothers who chose to parent their child, plaintiff was provided with the name and telephone number of a woman named Tina and was told it was okay to call her. Plaintiff did talk about the fact that she was considering parenting. From their statements, though, Mrs. Letizia was convinced that the Murrays were not prepared to parent at this time, as no concrete plans were being developed. The meeting with Lynn and Jerry did not go well, but the meeting with the Bonannos seemed to go well. Plaintiff was composed throughout the meeting. Following the meetings, a visit with the baby was planned for the next day.

Appendix B

Also, earlier on January 18, 2000, Mrs. Propert took Baby A to a doctor, complaining that the baby had congestion, sneezing and bowel movement problems. The doctor concluded that the baby had a viral syndrome and recommended new formula, nose drops and a vaporizer.

On January 19, 2000, a visit with the baby was scheduled at Family Options. Mrs. Propert, Mrs. Letizia, plaintiff and her mother were present. Following the visit, a discussion was held regarding where the parties stood. Mrs. Propert and Mrs. Letizia stressed that it was important to come to a conclusion soon, because the baby would begin bonding and the baby should have stability in her life. The child needed a pediatrician. It was pointed out that the child had been to a doctor and should have a regular pediatrician.

Mrs. Letizia said that time was of the essence. Mrs. Propert would not keep the child after Saturday, January 22, 2000. A decision was needed. Plaintiff was told that she had already done the hardest part — leaving the hospital without the baby. Mrs. Propert told her that the baby had gone from Nick and Elena to the plaintiff, to the hospital, to Mrs. Propert, and was headed for a foster home, and this lack of stability was not fair to the baby. Plaintiff cried about being selfish. There were no other family members who were available. Plaintiff felt the decision was overwhelming. She had continued concerns about the "connection," or lack thereof, that she felt with the Bonannos. Plaintiff was told to try parenting if she was undecided, but it was pointed out that she did not have bottles and other necessary items. Plaintiff knew that she did not have day care in place. Her options, therefore, were foster care with Denise Modica for

$75 per day until she could work out something else, a DYFS placement, leaving school for a period of time to parent, seek options for day care for the "gap, or adoption. But Mrs. Propert had described DYFS in such terms that it was not a viable option to plaintiff.

Mrs. Propert stated that plaintiff's inaction indicated to her that plaintiff wanted adoption. Plaintiff asked for more meetings to feel a better connection with the prospective parents. Mrs. Propert said no, unless she had some commitment to seriously consider adoption, since it would not be fair to the prospective parents. Plaintiff was told it would be fine to parent for a month or more and then go back to the agency for placement, but there would be no guarantee that all the prospective couples would still be interested. Plaintiff, not willing to give up some school and, therefore, in her mind, not able to parent without day care for newborns, (even though she never personally explored the availability of same), was left with DYFS, Ms. Modica or adoption. She was unwilling to consider DYFS given Mrs. Propert's negative statements about it. She then said "I guess it is Peggy and Ed," referring to the Bonannos.

Plaintiff never asked Mrs. Propert why she could not keep the baby after January 22, 2000, or if Ms. Modica would. Mrs. Propert said private foster care was available with Ms. Modica. Testimony indicates that Ms. Modica was available if that choice had been pursued. The concept of hiring a babysitter for the problematic "gap of time" period was never raised by plaintiff at the meeting, nor did the agency provide a full explanation as to how that might work at any time. Mrs. Propert stated that a decision had to be made. She did

not say what the decision had to be, but merely that it was time to come to a resolution. The agency was pressing for an answer. Mrs. Murray clearly wanted some closure on this matter and she also wanted the issue resolved.

When Mrs. Propert stated that plaintiff's inability to parent, evident in her inaction, indicated to her that plaintiff did not really want to parent, Mrs. Murray was convinced that adoption was the right solution. At this time, plaintiff did not voice a direct response, but merely said, "I guess it looks like it is the Bonannos". She was told that they would like to have a decision by Friday or Saturday. Plaintiff asked for a meeting between her, her mother and the Bonannos, without anyone from the agency present, which was scheduled for the next night.

No one asked plaintiff to sign any surrender documents or any other documents on January 19, 2000. However, in Mrs. Murray's mind, this meeting was the meeting during which it was decided that her daughter would place the child for adoption. Plaintiff felt that she had made her decision at that time and there was no going back on it. However, neither Mrs. Propert nor Mrs. Letizia felt that anyone was bound by anything that happened at that meeting. They told plaintiff to think about her options. Further, no documents were signed, even though plaintiff had the surrender documents for quite some time. This meeting, which included visitation, lasted about two and one-half hours.

During the meeting, plaintiff asked a number of questions about surrenders and what would happen with respect to custody if the adoptive parents should die.

She was not informed that she could sign a conditional surrender, which would be conditioned on adoption by a specific family. She again pointed out that her desire was to have a two parent household, openness with one to three meetings with the child per year, and a full-time mom.

Earlier on January 19, 2000, prior to the meeting, Mrs. Letizia had indicated to the Bonannos that they were the finalists and she thought plaintiff would sign the surrender at the meeting. The Bonannos, upon hearing this, ordered a bassinet on that date, thinking they could return it if things did not work out.

On January 20, 2000, Mrs. Letizia set up the meeting for that evening at the Murray home. No one other than the Murrays and the Bonannos would attend. Also, plaintiff called Mrs. Letizia earlier in the day and reviewed in great detail the affidavit of surrender, DFO-17, and the surrender DFO-19. She again objected to the language in the first paragraph of DFO-19, which said she could not properly care for her daughter and she was wondering whether her daughter would ever see that language, because she felt it was hurtful. The meeting between the Bonannos and plaintiff lasted four and one-half hours. Plaintiff provided pizza and the Bonannos provided dessert. The parties discussed all sorts of topics and the meeting ended with the parties hugging each other. Plaintiff talked about delivering the child to the Bonannos at their home. Plaintiff was composed throughout.

On January 21, 2000, plaintiff advised Mrs. Letizia that the meeting went well and she was ready to go forward with the adoption plan with the Bonannos. It was suggested that

she purchase an outfit and a gift for the child, and options for delivery of the child were discussed. Plaintiff stated that she would like to personally bring the baby to the Bonanno's home. It was arranged that the delivery of the child would occur that evening, January 21, 2000.

Plaintiff purchased an outfit and a necklace for her daughter. That evening, January 21, 2000, she dressed the baby at the agency and following that, but prior to going to the Bonanno's home, she signed four documents, DFO-16, a birth parent's affidavit regarding legal representation, DFO-17, an affidavit of surrender, DFO-19, a surrender, and DFO-23, a birth parent's information sheet. DFO-16, the acknowledgement that she had a right to an attorney if she wanted one, had never been presented to plaintiff before. When asked why that form had not been given to plaintiff earlier, the agency simply said they forgot. However, on January 11, 2000, in response to a question by Mrs. Murray, they had discussed the fact that a lawyer was not necessary, but one could be had if they wanted it.

Testimony from Family Option's expert was that no regulation requires this and that the expert's agency never uses such a form. With respect to DFO-17 and 19, plaintiff has protested that she never really read the documents, but she clearly stated to Mrs. Letizia, on occasion, that she hated the documents, particularly the first paragraph of the actual surrender. It is hard for the court to adopt the view that she never really read the documents when she made specific comments about things that were objectionable in the first paragraph and when she, in detail, filled out, and during cross-examination, acknowledged reading each and every

one of the provisions in DFO-17 prior to signing it. The court finds that plaintiff knew the import of both DFO-17 and 19.

Plaintiff claims she was "tricked" that Friday and her mother claims they were "ambushed." The parties were in the reception room at the Family Options office which is approximately fifteen feet – by – fifteen feet. Mother and daughter were present, approximately three to six feet apart. The testimony indicates that plaintiff had the documents, but for DFO-16, in her purse and her mother passed them to plaintiff when Mrs. Letizia asked for them. While it is clear that Mrs. Letizia did not read the documents aloud, she did tell plaintiff what they were and asked if she had any questions. She had gone over these documents on December 11, 1999, as well as during the telephone conversation on January 20, 2000, and plaintiff clearly understood what she was signing. Plaintiff never attempted to halt the proceedings and she never asked her mother for assistance in halting the proceedings. Plaintiff testified she knew the difference between foster care and adoption and that she knew it was final when she placed the child. She also said that she should have taken more responsibility for her actions.

When asked how she was tricked, plaintiff initially stated that Mrs. Letizia was speaking in a low voice and that Mrs. Propert was distracting her mother. However, given the conversations between and Mrs. Murray prior to this meeting, and the knowledge that her mother knew that this meeting was to precede the actual surrender, this court did not find plaintiff's allegations of a conspiracy to distract Mrs. Murray while her daughter was forced to sign the surrender to be at all credible. Though the court would have preferred that the

agency read the documents out loud and execute same with some more degree of solemnity, no statute requires it.

The alleged trick, according to plaintiff, was that the agency told her there was no day care when such is, in fact, available. It is clear that Mrs. Letizia told her that she was not aware of any day care for newborns in her area. It is equally clear that she gave her a reference to DYFS and to Social Services for further information. Further, it is also clear to this court, that this plaintiff, her mother, and her friends, had the ability to do further research. Moreover, they knew, yet never inquired on January 19, 2000, that there was a woman, Ms. Modica, who was willing to care for the child, for at least some period of time, for $75 a day.

Following the execution of the documents, the parties went to the Bonanno's home, where the baby was delivered personally by plaintiff to the Bonannos. The pictures introduced in evidence, DFO-1 through 5, portray a happy, warm scene. Plaintiff is not portrayed as visibly upset in any way. This was confirmed by the agency personnel and the Bonannos. Mrs. Letizia and Mrs. Propert left and the Murrays stayed for approximately forty-five minutes thereafter. There is no indication in the record that there was any great emotional upset on plaintiff's part.

On January 22, 2000, Mrs. Letizia spoke to all of the parties. Plaintiff advised her that the prior night went wonderfully, she was pleased with her decision, she was at peace and she felt connected. They also had a discussion about bi-weekly telephone contact with Ms. Bonanno. On January 23, 2000, Mrs. Letizia contacted plaintiff who

advised her that she had expected to cry more but that she was at peace still.

On January 23, 2000, plaintiff told her mother that she was not well at all and felt she had made a mistake, at which time her mother reacted "oh my God, we have made a mistake. Diane was wrong." On January 24, 2000, Mrs. Murray began to look for an attorney. At no time did either Mrs. Murray or plaintiff ever call the agency or the Bonannos to ask that the child be returned. The call seeking the return of the child was not made until February 4, 2000, when the Murray's attorney called the Bonannos.

On January 25, 2000, the child entered the hospital due to an internal infection. Plaintiff learned about this from the agency and was told by Mrs. Letizia that she could contact Mrs. Bonanno at the hospital to learn about the child's welfare, if she so desired. Mrs. Letizia also asked about any family medical history that may be helpful. Plaintiff never mentioned she wanted the child back in calls with Mrs. Letizia after placement. On January 27, 2000, plaintiff contacted Mosha. She advised him of what had occurred and she said she was not asking anything from him, except medical information. She also advised him that he had 120 days to act, under the Parentage Act, and that she had already placed the child for adoption.

On February 2, 2000, Mr. Goodman was retained as counsel by the Murrays. On February 4, 2000, Mr. Goodman called the Bonannos seeking a return of the child. On February 8, 2000, Mosha called plaintiff and was referred to Mrs. Murray. Mrs. Murray spoke with him. He talked about

his family in Israel, New York and Florida, and that perhaps he could raise the child in Israel, but that the Jewish culture would be quite important to him. Mrs. Murray terminated the telephone call saying he was not making any sense. On February 14, 2000, following the Bonanno's refusal to return the child, plaintiff's attorney filed the Verified Complaint in this court with the Order to Show Cause.

Conclusion of Law

An Approved Agency

In order for plaintiff to prevail, she must prove, by a preponderance of the evidence, non-compliance with the statutory requirements. *N.J.S.A.* 9:3-41a provides that the surrender must be made to an "approved agency."[4] Plaintiff argues that Family Options is not an "approved agency," and thus, it was not authorized to take the surrender at issue. Plaintiff alleges that the records of the Secretary of State show that Family Options' non-profit certificate was revoked in 1998, due to its continued failure to file annual reports since 1994. Plaintiff alleges that the Bonannos first contacted Family Options in January 1999, and therefore, their home study was conducted while Family Options was not a non-profit corporation as its corporate charter was revoked.

Family Options acknowledges that, due to an inadvertent error, its corporate charter was revoked on March 16, 1998.

---

4. The statute defines "approved agency" as "a non-profit corporation association or agency, including any public agency, approved by the Department of Human Services for the purpose of placing children for adoption in New Jersey." *See N.J.S.A.* 9:3-38.

Appendix B

Family Options argues that, on August 3, 1994, it changed its name, by way of a Certificate of Amendment to its Certificate of Incorporation, and sometime thereafter, received notice that fees were past due and reports had not been filed and that, in order to maintain corporate status, same had to be paid and filed. Family Options acted accordingly, and alleges that since that time, it has not received any notice of revocation of the corporate charter under either name.

Upon receipt of plaintiff's brief, Family Options investigated the status of its corporate charter, and upon learning of the revocation, it ordered an expedited reinstatement package, which has been completed and submitted for filing.

Pursuant to *N.J.S.A.* 15A:4-5c, once the agency pays the appropriate fees and files the reinstatement package, the reinstatement relates back to the date of the issuance of the proclamation revoking the corporate charter and validates all actions taken from that date forward. *See Asbestos Workers Local Union No. 32 v. Shaughnessy*, 306 *N.J. Super.* 1 (App. Div. 1997). In addition, where both parties believe that the entity was properly licensed at the time of the contract, and subsequent to the transaction, the entity's corporate charter is reinstated to relate back to the date of the revocation, there can be no argument that the contract is somehow invalid or can be revoked. This is so as the intention of the parties at the time of the contract controls. *See Asbestos Workers Local Union No. 32 v. Shaughnessy,* 306 *N.J. Super.* at 4.

Family Options, throughout its entire existence, has continued to act as a licensed agency. Family Options alleges that it had no knowledge of the revocation. It is evident that,

upon learning of same, it acted immediately to rectify the problem and have its corporate charter reinstated. In addition, all parties, throughout the current adoption process, believed that Family Options was an "approved agency."

Most importantly, no proof was ever submitted to this court that Family Options' license to operate as an "approved agency" was ever revoked. Plaintiff's argument is that an "approved agency" must be a non-profit corporation and, if its corporate charter is revoked, its license is automatically suspended. There is no law to support this, and no proof that such occurred. Moreover, counsel's logic overlooks the fact that an "approved agency" need not be a corporation. The definition refers to not only a non-profit corporation, but also, an association or agency. Therefore, even if Family Options' corporate charter was revoked, under the definition of "approved agency," the licensed agency could remain licensed as a non-profit association or agency. Accordingly, based on the statutory language, case law and parties' intentions, it appears that the revocation of Family Options' corporate charter, which is currently in the process of being reinstated, does not effect the validity or legality of plaintiff's surrender.

Signature Requirement

The next element of the statute requires the surrender document to be signed by the person surrendering his/her child. This element has clearly been met. Plaintiff, herself, testified that her original signature is on all of the surrender documents.

Appendix B

Acknowledgment Requirement

The next statutory requirement is that the surrender document must be acknowledged by an individual authorized to take acknowledgments in the state of execution. Mrs. Letizia acknowledged the surrender documents at issue. She signed the surrender form as a notary. No party has contested her acknowledgment. Therefore, this requirement has been satisfied.

Information Required to be Provided a Birth Parent Prior to Surrender

The next two elements of the statute require: (1) the adoption agency, or its agents, prior to the execution, to inform the surrendering parent that the surrender document is a "surrender of parental rights" and means the "permanent end of the relationship and all contact" between the parent and the child, and (2) the agency to inform the surrendering parent that the surrender constitutes a "relinquishment" of the parent's rights to the child.

Plaintiff clearly was made aware by the agency and in particular by Mrs. Letizia, that the surrender document was a surrender of parental rights, the permanent end of the relationship and all contact [other than as may be permitted by the Bonannos in the future] and a relinquishment of her rights to the child.

Mrs. Letizia first gave plaintiff DFO-17, the affidavit of surrendering parent, and DFO-19, the surrender of custody and consent for adoption, at their initial meeting on December

11, 1999. Mrs. Letizia then reviewed the forms and explained them to plaintiff and left them with her. She again gave plaintiff a copy of the forms on January 12, 2000, in the hospital, and, on January 14, 2000, at plaintiff's home. Plaintiff testified that, on January 15, 2000, in the car on the way to the agency she personally filled out each box on DFO-17. She said that she offered the forms to the agency, on January 15, 2000, but was told to hold onto them.

Following the January 19, 2000 meeting, plaintiff called Mrs. Letizia at home and asked questions, which Mrs. Letizia answered. Before signing the documents on January 21, 2000, plaintiff had these documents for more than forty days, had an opportunity to ask questions, had asked questions on January 20, 2000, was concerned with the language of the first "whereas" provision of DFO-19 and discussed same with Mrs. Letizia, and was asked again, just prior to signing the documents, if she had any questions.

In plaintiff's direct testimony, she initially claimed that she did not read the documents, but simply signed them. This court finds that testimony incredible. On cross-examination, plaintiff acknowledged that she had the documents since December 11, 1999. She was concerned with the language of the first "whereas" provision in DFO-19, and prior to January 21, 2000, she asked Mrs. Letizia whether her daughter would ever see DFO-19. Further, plaintiff acknowledged that she checked off each of the boxes on DFO-17. Specifically, plaintiff check off "yes" to the following provisions of DFO-17:

Appendix B

- "Do you understand that if you sign the Surrender of Custody and Consent for Adoption form, you are giving up all your rights as a parent of this child forever?"

- "Do you understand that if you sign the Surrender of Custody and Consent for Adoption form, this agency will become the only legal guardian of your child?"

- "Do you understand that if you sign the Surrender of Custody and Consent for Adoption form, your child may be placed for adoption?" and,

- "Do you understand that even if you change your mind in the future, your child will not be returned to you because the surrender is irrevocable and binding?"

In addition, plaintiff testified that she knew that the surrender was a final act and, that given the current lack of judicial enforcement of an open adoption, her future contact with the child would be controlled by the Bonannos, as the adoptive parents.

Although Mrs. Letizia did not read the surrender documents aloud immediately prior to obtaining plaintiff's signature on same, she had fully explained them in the past, and plaintiff fully and completely understood, the effect of the documents. Accordingly, the court finds that this statutory requirement has also been satisfied.

Appendix B

Counseling

N.J.S.A. 9:3-41a further requires the agency, prior to the execution of a surrender, to offer counseling to the birth parent. In furtherance of that statutory requirement, *N.J.A.C.* 10:121A-5.4(b)(7)(c) requires an agency, prior to taking a surrender, to provide the birth parents with:

(1) at least three face-to-face counseling sessions conducted in a private and professional setting by qualified social work staff on separate days and that the birth parents were:

(i) offered counseling that explores alternative plans for the child including but not limited to temporary foster care, day care and care by relatives;

(ii) informed that only legal parents or legal guardians have the right to custody and control of their child and to surrender their child for adoption;

(iii) prepared, along with the child, for surrender and separation;

(iv) referred to other community resources when the agency cannot provide needed services;

(v) informed that the agency may contact them in the future if the adult adoptee or adoptive family or emancipated minor requests information or wishes to meet the birth parents;

(vi) advised that they may sign a written agreement at any time indicating their willingness to be contacted and/or to provide information if requested by the adoptee or adoptive family;

(vii) asked to update and submit to the agency their address(es) and/or any significant medical information required on the Medical Information Form, so that the medical information could be shared with the adoptive family and/or the adult adoptee; and

(viii) requested to provide an itemized statement for all adoption-related cost, if any, paid by the prospective adoptive parents prior to agency involvements in the adoption or an affidavit that no money was expended; and;

(2) Requested to sign a statement that indicates either:

(i) the agency explained the information in (c)(1) above to them; or

(ii) they refuse to participate in the counseling sessions.

Plaintiff alleges that Family Options did not offer counseling that fully explored alternative plans for the child, particularly with respect to day care, and that such failure vitiates the surrender. The court notes though that Plaintiff testified that she signed an acknowledgment of counseling form, DFO-15 on January 15, 2000 which states in pertinent part that:

1. "I have been offered counseling that explored alternative plans for my child, including but not limited to temporary foster care, day care and care by relatives;

3. I have been prepared, along with my child, for surrender and separation;" and

4. I have been referred to other community resources when Family Options was unable to provide needed services."

Our Supreme Court, in the *Matter of Baby M*, 109 *N.J.* 396 (1988), noted that counseling is one of the prerequisites

to irrevocability, and rightly so, given the most serious consequences that flow from a surrender. The *Baby M* Court noted that regulations requiring approved agencies, prior to accepting irrevocable consent, to provide advice and counseling to the birth parent, make it more likely that the birth parent fully understands and appreciates the consequences of his/her acts. *See Matter of Baby M*, *supra*, 109 *N.J.* at 432-33. The standard, then, as to whether the counseling in a given case is adequate, is determined by whether the counseling complies with the regulatory requirements set forth above and is done in such a manner as to ensure that the birth mother is likely to fully understand and appreciate the consequences of her act.

The testimony clearly indicated that there were at least three face-to-face counseling sessions conducted in a private and professional setting or at plaintiff's home. Mrs. Letizia met with plaintiff at her home on December 11 and 14, 1999. She met with plaintiff in the hospital on January 12, 2000. On December 27, 1999, as well as January 15, 16 and 19, 2000, Mrs. Letizia and plaintiff met at Family Options office. In addition, on January 18, 2000, they met at a diner. While it is clear that the bulk of the discussions dealt with adoption, in particular the concept of open adoptions and the limitations of same, it is equally clear that Mrs. Letizia spoke with plaintiff about her desire to parent the child herself. Plaintiff testified that, prior to the birth of the child, she quickly dismissed any discussions that dealt with parenting since she felt she was not at all ready to take that route. It was also clear, to the court, that the agency asked plaintiff about relatives or others who might provide foster care or assistance. As set forth in the statement of facts above, when

questions of day care arose on December 12 and 18, 1999, plaintiff was referred to DYFS and the Board of Social Services. While it is clear that the caseworker, Mrs. Letizia, expressed her opinion that she was not aware of any day care options for newborns in plaintiff's area, the topic was certainly discussed, and plaintiff was aware of it and the references to DYFS and the Board of Social Services. Likewise, on at least two occasions, foster care with Ms. Modica, as well as DYFS placement, were discussed.

Plaintiff argues that these discussions did not "fully explore" the alternate options. In plaintiff's view, the caseworker should be charged with the responsibility of not only advising a birth mother of the available options to adoption, but also with giving her detailed plans how each option could work for her. This court does not find same required by the regulations. The regulation provides that the agency is to refer birth parents to other community resources when the agency cannot provide the needed services. *See N.J.A.C.* 10:121A-5.4(b)(7)(c)(1)(iv). Both experts in agency practice testified that they provide birth mothers with other resource references, rather than make the calls themselves or detail specific plan alternatives. One noted that this was due to privacy issues, which a birth parent may wish to protect. The experts also testified that it is important for the birth mother to do the follow-up, so she can speak directly to any individuals who might provide future services and to make sure she is comfortable with her decision. Neither of the experts stated that they would accompany a birth mother to any of these resource centers, but rather, they would, at most, provide them with the name, address and telephone number of same.

Appendix B

Here, it is unfortunate that the address and telephone number of DYFS or the Board of Social Services were not given by the agency. However, the court recognizes that the plaintiff has completed some college, has above average intelligence, and could have easily made whatever additional contacts she wished. Moreover, testimony indicated that plaintiff's mother looked in the telephone book prior to the surrender for some local day care agencies and did not find advertisements for agencies which provided newborn day care. Further, plaintiff never called DYFS or the Board of Social Services, nor did she explore her day care options.

Plaintiff alleges that the agency's sole focus appeared to have been to make her feel more comfortable with the prospective adoptive parents, despite her indication that she might want to parent the child herself. The record, however, is devoid of any evidence that plaintiff said she wanted to parent the child herself and she wanted to figure how what can be done or that she did not want to interview any more prospective adopted parents or that she wanted additional options or information about day care.

Up until January 17, 2000, plaintiff herself always dismissed the idea of parenting so it is not surprising the agency was focused primarily on adoption.

On cross-examination, plaintiff testified that she readily understood the availability of people, such as babysitters, who might be of assistance to her. Plaintiff had babysat. She also testified that she understood the difference between foster care and adoption. The agency provided plaintiff with the name of a birth parent who had placed her child for

adoption, as well as one who had not. It should be noted, however, that while plaintiff complains that the agency was primarily focused on adoption, plaintiff's doctor referred her to the agency for that purpose, and for the first five weeks of the relationship, plaintiff expressed no interest whatsoever in parenting. It is also clear that Mrs. Letizia and Mrs. Propert advised plaintiff that if, at any time, she was considering parenting, she could take the baby home. They further advised that if she was not sure of whether or not she wanted to parent, she should perhaps try to see how it worked.

Therefore, this court finds that Family Options satisfied the standards set forth in *N.J.A.C.* 10:121-5.4(c), and that their discussions were adequate so that plaintiff fully understood and appreciated that she had choices to adoption and the consequences of her surrender. *See Matter of Baby M, supra,* 109 *N.J.*at 432-33.

While it would have been ideal if the agency had preprinted pamphlets and lists detailing temporary foster care, the nature of temporary care, the nature of day care, and agencies within the area, this is not statutorily required.[5]

---

5. Plaintiff argues that Family Options violated *N.J.A.C.* 10:121A-3.4, by not providing her with a pamphlet or written statement stating that the agency is required to be certified "by the Bureau of Licensing of the New Jersey Division of Youth and Family Services pursuant to the State Adoption Law." The court finds that Family Options did, in fact, give plaintiff a pamphlet, DFO-7, which stated that it is "a private, licensed non-profit adoption agency and counseling center," rather than it is required to be certified. The court concludes that this, at best, is a de minimis violation of the regulation, and it clearly does not rise to a level that would vitiate the surrender at issue.

This court finds that plaintiff was fully cognizant of her options. Therefore, this court, concludes that the counseling, while less than ideal, was adequate and sufficient, and thus, Family Options satisfied the statutory requirement regarding counseling.[6]

Plaintiff also argues that the surrender should be invalidated because Family Options did not inform her of her right to have an attorney. The court finds that during the initial meetings on December 11, 1999, plaintiff's mother inquired if she needed an attorney, and the agency responded that she could retain one if she wanted to, but it was not necessary. Plaintiff's mother was not anxious to have an attorney involved. The court notes that although the birth parent's affidavit regarding legal representation, DFO-16 was not given to plaintiff until January 21, 2000, when she signed the document, plaintiff could have halted the adoption process by simply stating that she wanted an attorney then. Plaintiff did not express such desire, but rather, signed the form. There is no requirement in law requiring an attorney in a voluntary surrender and one expert testified they never even have a document like DFO-16 signed. Plaintiff's reliance on *N.J.A.C.* 10:121A-4.4(d) as authority for the proposition that counsel must be provided is misplaced. That section merely requires an agency to make sure its staff is prepared to provide counsel, if sought. The court concludes

---

6. Plaintiff in summation obliquely raised alleged regulatory violations as grounds to void the surrender, particularly that Mrs. Propert as executive director was acting improperly as a case supervisor and that Mrs. Letizia's compensation was such as to be a regulatory violation. This court does not find either allegation supported in the record by a preponderance of the evidence.

that plaintiff's failure to have an attorney does not rise to a level to vitiate the surrender.

Duress

The final section of the statute provides that a surrender can be invalidated only at the agency's discretion or "upon order or judgement of a court of competent jurisdiction setting aside such surrender upon the proof of fraud, duress or misrepresentation by the approved agency." Plaintiff alleges that the surrender was procured by duress on the part of Family Options, and therefore, the document is invalid.

The elements of duress are set forth in *Shanley & Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* 200, 212-13 (App. Div. 1987).

> Our Supreme Court has recognized that when there has been moral compulsion sufficient to overcome the will of a person otherwise competent to contract, any agreement made under the circumstances is considered to be lacking in voluntary consent and therefore invalid. *Rubenstein v. Rubenstein*, 20 *N.J.* 359, 365, 120 *A.2d* 11 (1956). Thus, the legal concept of duress is based upon the "unreality of the apparent consent" of a contracting party. *Id.* at 366. 120 *A.2d* 11. In determining whether a contracting party is entitled to be absolved from his contractual obligations due to duress, the court must therefore look to the condition of the mind of the person subjected to coercive measures.

Appendix B

In the modern view, moral compulsion or psychological pressure may constitute duress if, thereby, the subject of the pressure is overborne and he is deprived of the exercise of his free will. The question is whether consent was coerced; that is, was the person complaining "induced by the duress or undue influence to give his consent, and would not have done so otherwise." [Ibid. (citing Williston on Contracts (rev. ed.) section 1604.) Emphasis supplied].

All attendant circumstances, including the age, capacity and relation of the parties, must be considered in determining whether a particular individual has been impelled to act by duress. In this respect, the test for duress is subjective, rather than objective, and does not turn on whether the duress is of "such severity as to overcome the will of a person of ordinary firmness." *S.P. Dunham & Co. v. Kudra,* 44 *N.J. Super.* 565, 570, 131 *A.2d* 306 (App. Div. 1957). Moreover, in considering the merits of a claim of duress, "the exigencies of the situation in which the alleged victim finds himself" must be taken into account. *Ross Systems v. Linden Dari-Delite, Inc.*, 35 *N.J.* 329, 336, 173 *A.2d* 258 (1961).

A party, however, will not be relieved of his contractual obligations, "in all instances where the pressure used has had its designed effect, in all cases where he has been deprived of the exercise of his free will and constrained by the

other to act contrary to his inclination and best interests." *Wolf v. Marlton Corp.*, 57 *N.J. Super.* 278, 286, 154 *A.2d* 625 (App. Div. 1959). Rather, "[u]nder the modern view, acts or threats cannot constitute duress unless they are wrongful." *Id.* at 287, 154 *A.2d* 625. Pressure may be considered wrongful when "it is so oppressive under given circumstances as to constrain one to do what his free will would refuse." *Rubenstein, supra,* 20 *N.J.* at 367, 120 *A.2d* 11 (citing *First State Bank v. Federal Reserve Bank,* 174 *Minn.* 535, 219 *N.W.* 908 (Sup. Ct. 1928)). In *Continental Bank of Pa. v. Barclay Riding Acad.* 93 *N.J.* 153, 177, 459 *A.2d* 1163 (1983), *cert. den., sub nom., Barclay Equestrian Center, Inc. v. Continental Bank of Pennsylvania,* 464 *U.S.* 994, 104 *S. Ct.* 488, 78 L.Ed.2d 684 (1983), our Supreme Court reaffirmed this principle, stating: We adhere today to our previous statement of the law of duress in *West Park Ave.* [*Inc. v. Ocean Tp.*, 48 *N.J.* 122, 224 *A.2d* 1] that the "decisive factor" is the wrongfulness of the pressure exerted. The term "wrongful" in this context encompasses more than criminal or tortious acts, *Miller v. Eisele,* 111 *N.J.L.* 268, 276 [168 *A.* 426] (E. & A. 1933), for conduct may be legal but still oppressive. As the Appellate Division rightly observed in *Wolf v. Marlton Corp.*, 57 *N.J. Super,* 278, 287 [154 *A.2d* 625] (1959), "[w]e have come to deal, in terms of the business compulsion doctrine, with acts and threats that are wrongful, not necessarily in a legal, but in a moral or equitable sense."

See Shanley & Fisher, P.C. v. Sisselman, 215 *N.J. Super.* at 212-13. Accordingly, the key inquiry in determining the existence of duress, in the current litigation, is whether plaintiff's free exercise of her own will was overborne by Family Options' conduct.

As our Appellate Division ruled, the court must look to the condition of the mind of the person subjected to coercive measures. *See Shanley & Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* at 212. Plaintiff points out that she is nineteen years of age, relatively unsophisticated, and had experienced a traumatic and unexpected pregnancy, which was not discovered until the beginning of her eighth month. She further argues that she was somewhat sleep deprived, isolated, under time pressure, and believed that her options were limited by the agency's statements, and hence, her will was overcome.

The court, however, has reviewed these allegations and notes that while she discovered her pregnancy somewhat late, plaintiff had more than fifty days from the discovery of her pregnancy to the date of surrender, during which to discuss the issue with whomever she wished. In fact, she testified that she spoke with her mother about it practically every day. She also spoke with her sister, Tara, her Aunt Helen, her godfather, Joe, her friend, Jamie, and Dr. Vianna. It is interesting to note that she even asked Dr. Vianna whether she would be able to have more children in the future. Of course, she also spoke frequently with Mrs. Letizia, and, on a number of occasions, with Mrs. Propert. Plaintiff mentioned that, on occasion, she looked on the Internet for information. Thus, plaintiff certainly was not isolated in any real sense.

Appendix B

Plaintiff mentioned that she was tired and somewhat sleep deprived and emotional. It is clear that she would likely be emotional in making this decision. It is equally clear that she would most likely be tired, having slept only about six hours a day. However, the court notes that almost immediately after coming home from the hospital, she returned to work and to a full-time schedule at school.

Plaintiff further complained about day care not being available, based on Mrs. Letizia's statement that there was no such day care. However, the court does not find, as a fact, that Mrs. Letizia made that statement, but rather, it finds that she stated that she was not aware of day care for newborns. Mrs. Letizia did, however, provide plaintiff with references and plaintiff was fully capable of exploring them. However, plaintiff did not pursue any references.

Plaintiff felt that she had a lack of options. However, she eliminated a number of the options. In particular, plaintiff made the conscious decision not to cut back on her classes or take a semester off from school until the child was older. At all times, she knew that was an option. Also, she did not take advantage of the $75 per day foster care worker, Denise Modica. The court notes that there is nothing in the record indicating that Ms. Modica was not available, nor that she or her mother ever inquired, on January 19, 2000, if foster care with Ms. Modica was still available.

Nothing in the record indicates that, at any time, Dr. Vianna, the nursing staff, plaintiff's treating physician in the hospital, or anyone felt that plaintiff was suffering from any thought disorder or was in such a state of depression

that professional assistance was necessary. It is clear that, throughout this matter, plaintiff frequently exercised her will. When the person from the Vital Statistics office visited plaintiff in the hospital and told her that she had to make a decision about the baby's name, plaintiff insisted upon and received more time in which to make such decision.

It clear that plaintiff rejected numerous prospective adoptive parents on criteria which she had set. Upon learning that plaintiff no longer wished to pursue Nick and Elena, negotiations with the couple were terminated. Also, it is clear that plaintiff requested an additional meeting with the Bonannos, on her terms, at her home without anyone from the agency present. Equally clear is that no one asked her to sign any documents on January 19, 2000, the date on which she alleges she made her decision. Moreover, she had two days, January 19 until January 21, 2000, the day the surrender documents were signed, in which to revoke any psychological commitment she felt she made on January 19, 2000.

With respect to the legal documents, while plaintiff protested that she did not read them on January 21, 2000, it is clear that she had the documents on at least three occasions prior to January 21, 2000. In addition, with respect to DFO-17, the affidavit of surrender, plaintiff personally checked each box and discussed same during a phone call with Mrs. Letizia on January 20, 2000. The pictures taken at the time of the surrender of the baby to the Bonannos do not demonstrate any emotional distress on plaintiff's part. (DFO-15 in evidence.)

The *Shanley* court clearly states that the test for duress is subjective rather than objective, that is, it is not a question

of whether the duress is of such severity as to overcome the will of a person of ordinary firmness. *See Shanley & Fisher, P.C. v. Sisselman,* 215 *N.J. Super.* at 212. In the current litigation, it is clear to the court that plaintiff's duress allegations are not supported by her own actions or inactions as discussed above. The mere allegation, by a person, that they felt under duress cannot prevail. The court must determine whether the given individual's will was overcome. Plaintiff's statement that she was under duress when she signed the surrender documents is evidentiary but conclusory.

Given the facts and plaintiff's actions and inactions, this court does not believe plaintiff's will was overcome. Clearly there was distress, but that is not duress. There is no doubt that plaintiff was not "free from emotions, tension, and inescapable anxieties which resulted from her pregnancy . . . [as] almost any person situated as [she was] would experience emotional trauma, but there is no law to the effect that surrender of a child is valid only if done without such distress. If such were the law, almost any child surrender and subsequent adoption degree, could be attacked." *See C.C.I. and N. v. Natural Parents,* 398 *So.2d* 220, 224-25 (Miss. 1981).

While this court finds that Family Options pressured plaintiff to make a decision, it does not find that the pressure exerted was to press for an adoption, but rather, it was employed to have plaintiff reach a decision about the baby's future. Plaintiff had the freedom to choose among the available options. Pressure to decide, in and of itself, is not duress. It only rises to the level of duress if plaintiff's will

was destroyed. *See Shanley & Fisher, P.C. v. Sisselman,* 215 *N.J. Super.* at 212-13. Influence exerted by means of advice, arguments, persuasion, solicitations and suggestions does not amount to undue influences or duress, unless it is so persistent, or otherwise so operates as to subdue and subordinate the plaintiff's will and take away that plaintiff's free volition. *See id.* As our courts have stated, it is only when the pressure is wrongful and constrains one from doing what his free will would not do, that a contract or, in this case, a surrender can be invalidated. *See Shanley & Fisher, P.C. v. Sisselman,* 215 *N.J. Super.* at 213. Obviously, under the law, wrongfulness encompasses more than criminal and tortious acts. It must be oppressive. *See id.*

The agency, in its professional opinion, stated something had to be done. It is clear that Mrs. Propert was not going to provide foster care beyond Saturday, something which she was free to do, and never promised to do more than that. A decision had to be made whether this child was to go to foster care, be parented at home, go to DYFS, or be placed for adoption. Here, the court does not find that the pressure to reach a decision exerted by Family Options upon plaintiff, was wrongful.

These are, and were, difficult, heart breaking and pressure filled decisions which plaintiff, at the young age of nineteen, had to make. The court is sympathetic in that regard. The court also notes that plaintiff had the support of her mother, who provided counseling at all times and financial willingness to support her regardless of her decision. The court notes that plaintiff made it very clear that she was not willing, even for a short period of time, to

put off her personal school goals and parent the child herself. Nonetheless, she always knew that was an option. She also knew that foster care with Ms. Modica was an option. With respect to day care, after Mrs. Letizia stated that she was not aware of any such services in the area, plaintiff did nothing. While she could have explored the sources referred to her by Mrs. Letizia, she simply dismissed the day care option. It is clear to this court, that, on January 19, 2000, plaintiff had several options, including simply refusing to make a decision. Moreover, she had forty-eight hours between the meeting of January 19, 2000 to the actual execution on January 21, 2000 to act. Therefore, the court does not find that the pressure for a decision, though real, was oppressive or wrongful.

The court also points out that the Restatement provides that "[i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." *See* Restatement (Second) of the Law of Contracts § 175(1) (1969). Comment b to this section explains that "[a] threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it." *See* Restatement (Second) of the Law of Contracts § 175(1) comment b (1969). Here plaintiff had available to her reasonable alternatives to signing the surrender. Plaintiff could have taken fewer courses or a leave of absence from school and parent the child herself. Similarly, she could have asked to have the child placed in foster care with Ms. Modica, so that she would have more time in which to make a decision. Also, she could have requested more time to further explore child care. Moreover, on January 19, 2000, she could have stated that

she needed to see more child care options. Further, while she made up her mind, she could have sought a DYFS placement. All of these alternatives were reasonable and present. Hence, in addition to the court's conclusion set forth above, it finds that reasonable alternatives were available to plaintiff, and thus, her duress claim does not prevail.

Conclusion

Based upon the findings of fact and the conclusions of law set forth above, plaintiff has failed to demonstrate, by a preponderance of the evidence, that the surrender which she signed on January 21, 2000, is not valid, binding and irrevocable, pursuant to *N.J.S.A.* 9:3-41a. Accordingly, the court finds in favor of the defendants and dismisses with prejudice plaintiff's claim.

The court's prior orders affording visitation to plaintiff are terminated; the stay entered with respect to defendants' third-party claim is lifted; and the court's prior order, dated March 20, 2000, concerning the sealing of the file and disclosure of identifying information, shall remain in full force and effect. The court hereby certifies, pursuant to Rule 4:42-2, that its Order of even date concerning this matter is final.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, FAMILY PART, UNION COUNTY DATED AND FILED APRIL 18, 2000

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: FAMILY PART
UNION COUNTY

Docket No. FD-20-721-00

BROOKE JACQUELINE MURRAY,

Plaintiff,

v.

FAMILY OPTIONS, EDWARD R. BONANNO and PEGGY BONANNO, h/w,

Defendants.

THIS MATTER having been opened to the Court by way of a Verified Complaint and Order to Show Cause filed by Robert W. Goodman, Esq., attorney for plaintiff, Brooke Jacqueline Murray, and responsive pleadings having been filed by Samuel L. Peluso, Esq., attorney for defendant, Family Options, James W. Miskowski, Esq., attorney for defendants, Edward R. Bonanno and Peggy Bonanno, h/w, and Kathleen B. Estabrooks, Esq., attorney for the infant, and the court having heard testimony, reviewed evidence, and after having considered the certifications and pleadings filed herein, and the arguments presented by the parties, for the reasons set forth in the Court's written opinion of even date, and for good cause shown;

Appendix C

IT IS ON THIS 18th day of April, 2000;

ORDERED (1) Plaintiff's action is dismissed with prejudice;

ORDERED (2) the Court's prior orders affording visitation to plaintiff are terminated;

ORDERED (3) the stay entered with respect to defendants' third-party claim is lifted; and

ORDERED (4) the court's prior order, dated March 20, 2000, concerning the sealing of the file and disclosure of identifying information, shall remain in full force and effect.

s/ Thomas N. Lyons
THOMAS N. LYONS, J.S.C.

APPENDIX D — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION DATED MARCH 26, 2001 AND FILED MARCH 28, 2001

SUPREME COURT OF NEW JERSEY

C-760 September Term 2000

50,875

B.J.M.,

Plaintiff-Petitioner,

v.

FAMILY OPTIONS, et al.,

Defendant-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4675-99 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to Rule 2:12-9.

Appendix D

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 26th day of March, 2001.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX E — RELEVANT STATUTES

N.J.S.A. 9:2-16

9:2-16. Voluntary surrender to approved agency

An approved agency may take a voluntary surrender of custody of a child from the parent of such child, or from such other person or persons who, by order of a court of competent jurisdiction, have been substituted for the parent as to custody of such child. Each such surrender, when properly acknowledged in the manner and form provided by sections 46:14-6 and 46:14-7 of the Revised Statutes,[1] shall be valid whether or not the person giving the same is a minor, and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction, setting aside such surrender upon proof of fraud, duress or misrepresentation.

N.J.S.A. 9:2-20

9:2-20. Judgment terminating rights; effect of judgment

If the court shall find that the parents of the child should have no further right to custody of the child, or that the custodian or guardian, if any, should have no further control and authority over the person of the child, a judgment shall be entered terminating such right or control and authority and transferring the custody of the child to the plaintiff. The judgment so entered, unless otherwise specified therein, shall not affect the duties of the parents, custodian or guardian with respect to support and maintenance of the child.

---

1. Repealed. See, now, N.J.S.A. § § 46:14-2.1, 46:14-6.1.

Appendix E

N.J.S.A. 9:3-41

9:3-41. Surrender of child; acknowledged signed instrument; relinquishment of rights and consent to adoption; validity; acceptance of custody by approved agency

a. Surrender of a child to an approved agency for the purpose of adoption, other than a surrender taken in accordance with P.L.1955, c. 232 (C. 9:2- 13 *et seq.*), shall be by a signed instrument acknowledged by the person executing the instrument before an officer authorized to take acknowledgments or proofs in the State in which the instrument is executed. Prior to the execution of the surrender, the approved agency shall, directly or through its agent, inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and child. The approved agency shall advise the parent that the surrender shall constitute relinquishment of the person's parental rights in or guardianship or custody of the child named therein and consent by the person to adoption of the child. The approved agency shall offer counseling to the parent, prior to the execution of the surrender. The surrender shall be valid and binding without regard to the age of the person executing the surrender and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency. The surrender taken pursuant to this section shall be valid whether

acknowledged in this State pursuant to section 1 of P.L.1991, c. 308 (*R.S. 46:14-2.1)* or acknowledged in another state or country pursuant to section 1 of P.L.1991, c. 308 (*R.S. 46:14-6.1)*.

b. Any approved agency may accept custody of a child by a duly executed instrument of surrender from a parent or guardian of the child or from another approved agency or any agency for the care and protection of children approved by any other state, by the United States or by any foreign country, which has duly obtained the authority to place the child for adoption.

Supreme Court, U.S.
FILED
AUG 2000

No. 00-1924

In The

Supreme Court of the United States

B.J.M.,

Petitioner,

v.

FAMILY OPTIONS; E.R.B. and P.L.B., his wife,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Division Of The Superior Court Of New Jersey

RESPONDENTS' E.R.B. and P.L.B. BRIEF IN OPPOSITION

HARRIET DINEGAR MILKS
Of Counsel and On the Brief
DINEGARMILKS
94 South Main Street
Ocean Grove, New Jersey 07756
(732) 988-3400

JAMES W. MISKOWSKI
Counsel of Record
MACFALL, RIEDL & MISKOWSKI, P.C.
45 North Broad Street
Ridgewood, New Jersey 07451
(201) 445-4600

Attorneys for Respondents E.R.B. and P.L.B.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

These Respondents take issue with Petitioner's identification of the parties, Pet. at iii, to the extent it was unnecessary since all the parties are listed in the caption, and because it contains argument, misstatements of fact, and inflammatory rhetoric. Rule 14(1)(a), (b).[1]

---

[1] Pursuant to the requirements of Rule 15(2), these Respondents specifically reserve their right to continue to object to the dozens of misstatements of fact and law in the Petition. The critical misstatements of fact and law upon which this Response in Opposition relies are identified herein. These Respondents accept and rely upon the facts as found by the courts below; to the extent any fact offered in the Petition differs from the corresponding fact as found by the lower courts, these Respondents object to it.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

INTRODUCTION 1

The Case Below 1

The Petition 2

REASONS FOR DENYING THE WRIT 3

Summary of These Respondents' Reasons for Denying the Writ 3

I.

THE STANDARD OF PROOF SET FORTH IN *SANTOSKY v. KRAMER* AND FOLLOWED IN *M.L.B. v. S.L.J.* DOES NOT APPLY HERE BECAUSE THIS CASE WAS NOT AN ADVERSARIAL TERMINATION PROCEEDING 5

The Standard of Proof 5

The Burden of Proof 7

II.

THE NEW JERSEY ADOPTION STATUTE IS NOT CONSTITUTIONALLY INFIRM BECAUSE IT DOES NOT PROVIDE FOR A PERIOD OF REVOCATION FOLLOWING A VOLUNTARY AGENCY SURRENDER 10

III.

NEW JERSEY'S ADOPTION STATUTE IS CONSTITUTIONALLY SOUND AND NEEDS NO REVIEW BY THIS COURT ON THE ISSUES PETITIONER RAISES 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

DeShaney v. Winnebago Cy. Dep't of Social Servs., 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) 7

In Re Adoption of Hernandez, 25 Wash. App. 447, 607 P.2d 879 (1980) 6

In the Matter of the Guardianship of D.M.H., C.L.H.W., L.F.H., and R.Q.H., 161 NJ 365, 736 A.2d 1261 (1999) 14

In the Matter of the Guardianship of K.H.O., 161 NJ 337, 736 A.2d 1246 (1999) 14

In the Matter of a Female Child, 85 Hawai'i 165, 938 P.2d 1184 (Int. Ct. App. HI 1997) 7

In the Matter of Baby M., 109 N.J. 296, 537 A.2d 1227 (1988) 14

In the Matter of the Adoption of a Child by P.F.R. and V.A.I., 308 N.J. Super. 250, 705 A.3d 1233 (App. Div. 1998) 12

In the Matter of the Adoption of Children by G.P.B., Jr., 161 N.J. 396, 736 A.3d 1277 (1999) 12

In the Matter of the Adoption of Infant Boy Crews v. Hope Services, 60 Wash. App. 202, 803 P.2d 24 (Wash. App. 1991), *aff'd* 118 Wash.2d 561, 825 P.2d 305 (Sup. Ct. 1992) 6, 8, 13

M.L.B. v. S.L.J., 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) 5

Meza v. Rodriguez, 305 Ill. App. 777 (Ill. App. 1999) 8

TABLE OF AUTHORITIES – Continued

Page

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) 3, 4, 5

Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2001) 10

United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966) 10

William D.A., Sr. v. Shawna Renee and Stephen Everett A., 1999 N.L. 1188850 (W.Va.) 7

STATUTES

Fl. Stat. § 63.082 11

Il. St. Ch. 750 § 50/9, 50/11 11

N.J.S.A. 9:3-41 4

N.J.S.A. 9:3-41(a) 8, 11, 12

N.J.S.A. 9:3-45(b)(2) 12

N.J.S.A. 9:3-45.1 12

INTRODUCTION

The Case Below

After a thirteen day trial, the court below found that the Petitioner, an intelligent college student, had purposefully solicited a state licensed adoption agency to assist her placing her newborn for adoption, and that she had voluntarily signed a surrender of her parental rights and consent to the adoption. Pet., App. B at 48a-49a, 82a, 90a-94a. The day after she signed the documents waiving her parental rights, Petitioner told the agency caseworker that she was "pleased with her decision" and "at peace." Pet., App. B at 69a. Two weeks later, she had an attorney call these Respondents to tell them that she changed her mind and wanted her baby back. Pet., App. B at 70a. These Respondents declined to return the child and Petitioner brought an action in the Superior Court alleging fraud and duress. In a meticulously detailed seventy-two page opinion, the trial court found that the surrender was valid, the adoption agency had complied with all the statutory requirements for taking the surrender, the plaintiff was fully aware of the consequences of her actions at the time she signed the surrender, and that the surrender was valid and enforceable. Pet., App. B. The trial court soundly rejected her claims of fraud, duress, trickery and conspiracy, finding her testimony not "at all credible." Pet., App. B at 68a. On appeal, Petitioner challenged the trial court's findings of fact and also argued that the court had applied the wrong standard and burden of proof.

The Appellate Division affirmed the trial court's conclusions in all respects. Pet., App. A at 21a. As to the trial court's findings of fact, the Appellate Division went

beyond its customary acknowledgement of deference and stated that the trial judge's findings on the claims of fraud and duress "appear to be eminently supported by the record." Pet., App. A at 10a. The Appellate Division affirmed the trial court's holding that in order to rescind a voluntary waiver of parental rights, plaintiff must establish by a preponderance of the evidence that the adoption agency obtained the surrender by duress. Pet., App. A at 21a. The appellate court further observed that "the problem" with Petitioner's argument is that her action was to rescind a voluntary waiver of rights, and as such, fundamentally different from the cases in which the state moves to terminate a person's rights over their objection. Pet., App. A at 21a. Petitioner filed a Petition for Certification with the State Supreme Court, and it was denied. Pet. at 1.

The Petition

The Appellate Division got it right. Below, and here, Petitioner tries mightily to transform what is essentially a state law case into a federal constitutional one. To this end, the Petitioner wishes away the nature of the proceeding of which she voluntarily availed herself and she recasts the case as one involving an involuntary, state-initiated termination of parental rights. Further, she asks this Court to turn our civil law on its head by transferring the burden of proof on civil claims like fraud and duress from the proponent of the claim to the alleged perpetrator of the wrongful action. For all the reasons set forth below, this Honorable Court should reject Petitioner's analysis and leave this case where it has been addressed quite properly – in the state courts.

REASONS FOR DENYING THE WRIT

Summary of These Respondents' Reasons for Denying the Writ

Stripped of rhetoric, the Petitioner's questions reduce to two: (i) Must the clear and convincing standard of proof be applied to the review of a voluntary waiver of parental rights under a state adoption statute (Petitioner's Questions #s 1, 2, and 3), and (ii) Assuming the waiver was valid when made, should the State have permitted its revocation in the circumstances here presented (Petitioner's Question #4).

The first question need not be addressed by this Court because the holding of the case on which Petitioner relies, *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), does not speak to voluntary waivers of parental rights. It considers the standard of proof required of the government when the state proposes to terminate a parent's fundamental rights to his child over his clear objection. Even if the holding of *Santosky* could be extended to cases like this one where the parent voluntarily waives her fundamental rights and consents to the following state action, *Santosky* would not be controlling of this case. The reason is that the case below rested not only on the trial court's identification of the *standard* of proof, but on the court's recognition that the *burden* of proof lay with the plaintiff.

Petitioner urges that the trial court should have required the adoption agency to prove by clear and convincing evidence that her surrender was valid and uncoerced. Pet. at 2, 4. These Respondents are aware of no case, anywhere in the country, which holds that an adoption agency or individual bears the burden of proving the

absence of fraud and duress in a challenge to the validity of a voluntary surrender of parental rights. Indeed, in each of the cases cited by Petitioner, it was not the agency or the prospective adoptive parents, but the challenging birth parents who bore the burden of proving their allegations of fraud and duress. In this case, too, the court below properly assigned the burden of proof to the plaintiff, and it concluded that she had failed to satisfy even the lower preponderance of the evidence standard because, among other reasons, her testimony was not at all credible. Pet., App. B at 68a. The trial court's conclusions and the appellate court's affirmation were proper, and they are not inconsistent with this Court's holding in *Santosky v. Kramer*.

Petitioner's second question, like the first, disguises a matter of state law to look like a federal one. The time periods for making and withdrawing voluntary surrenders of parental rights are the product of considered legislative analysis in our State. The New Jersey Adoption Statute features numerous safeguards for the due process rights of birth parents, including the right not to surrender one's rights at all, and the provision that no waiver shall be deemed valid unless taken by a licensed agency or before a court at least seventy-two hours after the child's birth.[2] There is nothing in this Court's due process jurisprudence and certainly nothing in the Constitution which begs review of the State Legislature's decisions on this issue. Therefore, these Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

---

[2] *N.J.S.A.* 9:3-41.

I.

THE STANDARD OF PROOF SET FORTH IN *SANTOSKY v. KRAMER* AND FOLLOWED IN *M.L.B. v. S.L.J.* DOES NOT APPLY HERE BECAUSE THIS CASE WAS NOT AN ADVERSARIAL TERMINATION PROCEEDING.

The Standard of Proof

These Respondents do not disagree that where the state initiates a proceeding to terminate parental rights over the parent's objection, the state bears a heavy burden to prove by clear and convincing evidence that the termination serves a compelling state interest. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). The clear and convincing evidence standard also applies where private citizens call upon the power of the state to terminate an objecting parent's rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).

The strict standard of proof applied in *Santosky* and *M.L.B* is necessitated by the nature of the fundamental interest and by the relative imbalance of power and control between the state and the parent. Where the vastly superior powers of the state are brought to bear on an unwilling individual, the heightened standard of proof is required for the protection of the individual's due process rights. That is not the circumstance of this case, however. Here, the individual solicited the help of a state licensed adoption agency for the purpose of placing her child for adoption. While the agency was bound by statute to – and did – counsel Petitioner about the existence of options other than adoption, the trial court found that her focus throughout her relationship with the agency was on placing the child with an adoptive family and bringing to

a close her own parental obligations.[3] Petitioner herself initiated the termination of her parental rights by executing not only an agency surrender of those rights but a written consent to the statutory termination proceedings that she knew would follow. Pet., App. A. at 10a-11a. Although the State alone may enter an order terminating parental rights, it was Petitioner and not the State or any state actor which disabled her rights in the first place. The proceedings from which she seeks relief were voluntary and nonadversarial. In such a circumstance, it cannot be said that Petitioner was deprived of her liberty interests without due process.[4]

To be sure, Petitioner now expresses much dissatisfaction with the adoption agency and she claims to be bitterly unhappy about the decision she made. Her predicament does not, however, create a due process issue. The due process clause limits the state's ability to infringe fundamental rights, but it cannot require the state to ensure that those interests do not come to harm through

---

[3] Specifically, the court found that Petitioner "made it very clear that she was not willing, even for a short period of time, to put off her personal school goals and parent the child herself." Pet., App. B at 93a. She was told of several alternatives to the relinquishment of her rights, but the court found it was she who eliminated all of them but adoption. Pet., App. B at 93a-94a.

[4] *See, In the Matter of the Adoption of Infant Boy Crews v. Hope Services*, 60 Wash. App. 202, 215, 803 P.2d 24, 32 (Wash. App. 1991), *aff'd* 118 Wash.2d 561, 574, 825 P.2d 305, 312 (Sup. Ct. 1992), (wherein the State's highest court held that where the State's procedures for voluntary terminations are followed and the plaintiff consents to the termination, there is no state action and due process is not implicated.). *See, also, In Re Adoption of Hernandez*, 25 Wash. App. 447, 452, 607 P.2d 879 (1980).

other means. *DeShaney v. Winnebago Cy. Dep't of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

If Petitioner believes, as she does, that harm came to her fundamental rights through other means in the form of wrongful coercion by the agency, then she has an adequate avenue of redress: a state civil action for fraud, duress, and undue influence. Her due process rights were protected by the availability of a state civil action to revoke her surrender. Her dissatisfaction with the results of that action cannot transform this case into one where state action demands a heightened standard of proof.

The Burden of Proof

It is not simply the standard of proof upon which Petitioner's scheme depends; she also argues that the burden of proof was wrongly assigned to her in the proceedings below. The Petition urges that the proponents of termination must bear the burden of proving by clear and convincing evidence that a parent's surrender was not obtained by fraud or duress. Pet. at 2, 4. This argument suffers two fatal flaws.

First, it is not supported by any case law. In each of the cases Petitioner cites it was the parent and not the agency or the proposed adoptive family who bore the burden of proving her allegations of fraud and duress.[5]

---

[5] In *William D.A., Sr. v. Shawna Renee and Stephen Everett A.*, 1999 N.L. 1188850, at fn. 1 (W.Va.) the court cited the relevant statute as permitting an adoption to be set aside where "the person who executed the consent or relinquishment proves by clear and convincing evidence. . . . " In *In the Matter of a Female Child*, 85 Hawai'i 165, 938 P.2d 1184 (Int. Ct. App. HI 1997), the

Second, in the history of our civil law the burden of proof on claims of fraud and duress has been assigned consistently to the party alleging it. This is only logical since (as the Appellate Division wisely observed in this case) no one knows better than plaintiff whether she was subject to wrongful pressure. Pet., App. A at 18a. The plain language of the controlling statute also appears to require the parent to prove duress in a revocation action. *N.J.S.A.* 9:3-41(a); Pet., App. A at 19a. Moreover, it is practically impossible to prove a negative. In the balance of equities, it makes more sense to require the plaintiff to show that her will was overcome than it does to expect the beneficiary of her action to show that it was not wrongfully obtained.

When these intuitive elements of our civil law are considered alongside the sensible observation that no person or agency can force a parent to voluntarily relinquish a child,[6] it is obvious why this must be a state law case and not a federal one. It rests solely on the trial court's findings of fact and conclusions of law regarding whether the adoption agency properly discharged its

---

appellate court affirmed the findings of the trial court which imposed on the objecting parent the burden of proving her allegations of fraud, undue influence or duress by clear and convincing evidence. Similarly, the court in *Meza v. Rodriguez*, 305 Ill. App. 777 (Ill. App. 1999) recognized the higher standard of proof in withdrawal-of-consent cases, but imposed it on the parent.

[6] *In the Matter of the Adoption of Infant Boy Crews v. Hope Protective Services*, 218, 803 P.2d 24, 34 (Wash. App. 1991), *aff'd*, 118 Wash.2d 561, 825 P.2d 305 (1992).

statutory duties and whether the plaintiff's will was overcome by wrongful conduct.

The trial court found that the agency substantially complied with numerous statutorily mandated safeguards, including (i) that it engage in at least three face-to-face meetings with the birth parent, (ii) that it fully explore the options available to her other than relinquishing her child, and (iii) that the parent know she can have legal counsel before making any decision about surrendering her child. Its findings are set forth with scrupulous citation to the record at Pet., App. B. at 74a-85a. Both of the lower courts observed correctly that the point of these procedures is to ensure the voluntariness of parental surrenders given to agencies. Where the procedures are substantially followed, the state has discharged its duty to ensure that actions taken thereunder are voluntary and the parent's right to due process is protected.

Here the trial court found that the agency was in substantial compliance with the statute and that Petitioner's surrender was voluntary. The Appellate Division affirmed, stating that the record supports the conclusion that plaintiff surrendered her child voluntarily and knowingly and in compliance with the pertinent statutory requirements. Pet., App. A at 17a.

Petitioner proposes not only to second-guess the lower court's findings of fact, but to reconfigure the State civil law so that in cases alleging fraud in the securing of waivers of parental rights, the burden of proof will rest not with the plaintiff but with the State. To hold as Petitioner urges, this Court would have to carve out an

exception to the existing civil law regarding the elements and proof of fraud, just for this type of family law case. In essence, the Court would have to "usher in a new regime of judicially prescribed, and federally prescribed family law."[7] The Court's historical solicitude for matters of state family law mitigates against its involvement in such an enterprise.[8]

II.

THE NEW JERSEY ADOPTION STATUTE IS NOT CONSTITUTIONALLY INFIRM BECAUSE IT DOES NOT PROVIDE FOR A PERIOD OF REVOCATION FOLLOWING A VOLUNTARY AGENCY SURRENDER.

Some states have enacted laws that provide for periods of reflection during which a birth parent may revoke her voluntary surrender of parental rights. No state supreme court has held that the Constitution requires this, and about half the states do not. Among those jurisdictions that do offer a post-surrender period of revocation, most impose certain restrictions on the right to revoke, in order to protect the newly formed

---

[7] *Troxel v. Granville*, Scalia, J., dissenting, 530 U.S. 57, 91, 120 S.Ct. 2054, 2075, 147 L.Ed.2d 49 (2001). Cautioning against judicial involvement in making distinctions that have traditionally been the work of the state legislatures, Justice Scalia made the cogent observation that federal judges are likely to be no better at adjusting state law that state legislators are and it is far better to leave the mistake-making to the legislators because they can correct their mistakes relatively quickly, and if they fail to, they can be removed by the people. *Id.*

[8] *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 506, 15 L.Ed.2d 404 (1966).

family from anything but the most meritorious challenges. A significant number of states do *not* recognize the right to revoke after a voluntary surrender where the child has already been placed in an adoptive home.[9] Others recognize a period of revocation in private or independent (i.e., not supervised by licensed agencies) adoptions, but not where the surrender is taken by a licensed agency, and where, presumably, there exist procedural safeguards to ensure the voluntariness of the parent's action.[10]

Whether to allow a post-surrender period of revocation and if so how long and under what circumstances, is a matter for the states' lawmaking bodies to determine. Each state legislature must consider the construction of its adoption statute as a whole, and determine whether it offers sufficient protection for the rights of the parties involved.

The New Jersey Legislature has devoted much attention to its adoption statute, and it has determined not to include a period of reflection beyond what we already have.[11] Specifically, the Legislature enacted comprehensive amendments to the adoption statute in 1994 and

---

[9] *See, e.g.*, Fl. Stat. § 63.082.

[10] *See, e.g. Il. St. Ch.* 750 § 50/9, 50/11.

[11] *N.J.S.A.* 9:3-41(e) states that no surrender of parental rights shall be valid if taken sooner that 72 hours after birth. Thus, all parents have at least three days to consider their decision. Surrenders taken by licensed agencies any time after that are irrevocable except upon proof of fraud. *N.J.S.A.* 9:3-41(a). The Petitioner attempts to grab this Court's attention by asserting that New Jersey is in the minority on this. She asserts that most other jurisdictions either provide for a pre-surrender judicial review or provide for a period of revocation.

1998. Among the sections amended were those addressing the rights of birth fathers to object to adoptions. Prior to the 1998 amendments, biological fathers could come forward and contest adoptions at any time they learned of the fact of their child's birth, up to the finalization of the adoption. The spectre of a formerly unknown or unidentified birth father appearing to claim his parental rights and disrupting an adoptive placement was a source of insecurity for prospective adoptive families and was the subject of a number of difficult cases in New Jersey and elsewhere.[12] Largely in response to cases like these, the Legislature amended the adoption statute to shorten the time period available to a biological parent to claim and defend his parental rights.[13] If the Legislature had been inclined to speak more or differently about the opportunities for biological mothers to reclaim their rights after a voluntary surrender, or if it had seen a need to provide for a cooling off period beyond what we already have, this would have been the time to do it.

Pet. at 27. Her information is incorrect. New Jersey does provide for a judicial surrender in which the court examines the birth parent and makes factual findings supporting (or not) the surrender. *N.J.S.A.* 9:3-45(b)(2). This is an alternative procedure under the statute.

[12] *See, e.g., In the Matter of the Adoption of a Child by P.F.R. and V.A.I.*, 308 N.J. Super. 250, 705 A.3d 1233 (App. Div. 1998).

[13] *N.J.S.A.* 9:3-45.1. *See, also, In the Matter of the Adoption of Children by G.P.B., Jr.*, 161 N.J. 396, 404, 736 A.3d 1277 (1999) (in which the state Supreme Court analyzed both the 1994 and 1998 amendments to the adoption statute as being enacted in response to the public and courts' growing impatience with the preservation of parental rights over the rights of children to stability and finality).

By leaving those provisions intact, the Legislature affirmed its commitment to the irrevocability of agency surrenders, as well as its commitment to a period of not less than three days before any surrender can take place. The intent of the State Legislature is clear on the issue of whether Petitioner ought to have been afforded a period of revocation following her voluntary surrender, and this Honorable Court should decline the Petitioner's invitation to inject itself into the State's public policymaking.[14]

III.

NEW JERSEY'S ADOPTION STATUTE IS CONSTITUTIONALLY SOUND AND NEEDS NO REVIEW BY THIS COURT ON THE ISSUES PETITIONER RAISES.

Fueling much of Petitioner's argument is her belief that the courts below have distorted the statute and case law to deprive her of her rights, contrary to what she says is the State's policy of keeping mothers and children together in the absence of proof that the parent is unfit. Pet. at 19. Respectfully, it is she who distorts the law.

It is not true, as she asserts, that New Jersey recognizes a commitment to resolve all doubts against the destruction of the relationship between parents and their

---

[14] Significantly, the Petition offers no suggestions about how much time the Constitution might have required this parent to be given to change her mind. It is a reasonable inference that Petitioner perceives the complexity of the judgment the Legislature would have had to grapple with, if not the conclusion that one court observed, that is: "For the parent who changes his or her mind, no time period would be long enough." *Crews*, 60 Wash. App. 202, 218, 803 P.2d 24, 34 (1991).

children except in cases of unfitness. *Id.* Our law has evolved considerably since *In the Matter of Baby M.*, 109 N.J. 296, 537 A.2d 1227 (1988). We now take a longer and more compassionate look at the rights of children, including those who find stability in adoptive homes.[15]

Key to our commitment to all parties to adoption is the availability of an irrevocable agency surrender. No parent is forced to avail herself of this procedure, but for those who do, it comes as close as anything can to guaranteeing that a surrender of parental rights is truly voluntary. It protects the birth parent's rights by affording her the opportunity for psychological counseling and representation by counsel, and it lets her know that she has options other than surrendering her child. Once it is undertaken, a proper agency surrender assures the newly formed family that it can grow and develop as freely as any family, without the threat of disturbance that can follow a surrendering parent's change of heart or circumstance. Most important, the agency surrender ensures that an adopted child will be secure in her new home. The State has a compelling interest in protecting the right of children to be secure in adoptive placements; its legislative determination to make agency surrenders irrevocable supports that interest.

Contrary to the draconian picture Petitioner tries to paint, this law does not slam shut the door of freedom for

---

[15] *See, e.g., In the Matter of the Adoption of Children by G.P.B., Jr., supra,* at n. 13; *In the Matter of the Guardianship of D.M.H., C.L.H.W., L.F.H., and R.Q.H.*, 161 NJ 365, 736 A.2d 1261 (1999), and *In the Matter of the Guardianship of K.H.O.*, 161 NJ 337, 736 A.2d 1246 (1999).

anyone. It balances the freedoms of the most important people in our society – parents and children. It does so with compassion and an overriding commitment to the security of children in their families. It is the product of socially and constitutionally sound reasoning and needs no review by this Court.

CONCLUSION

Wherefore, for all of the reasons set forth herein, these Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

HARRIET DINEGAR MILKS
Of Counsel and
On the Brief
DINEGARMILKS
94 South Main Street
Ocean Grove, New Jersey
07756
(732) 988-3400

JAMES W. MISKOWSKI
Counsel of Record
MACFALL, RIEDL &
MISKOWSKI, P.C.
45 North Broad Street
Ridgewood, New Jersey
07451
(201) 445-4600

Attorneys for Respondents E.R.B. and P.L.B.

Supreme Court, U.S.
FILED
AUG 24 2001
CLERK

(3)

No. 00-1924

In the Supreme Court of the United States

B.J.M.,

Petitioner,

v.

FAMILY OPTIONS,
E.R.B. and P.L.B., h/w,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

RESPONDENT'S BRIEF IN OPPOSITION

SAMUEL L. PELUSO, ESQ.
Counsel of Record
PELUSO STAUFENBERG CASTELLUCI
& HANULA
740 BROAD STREET, HIGHWAY 35
SHREWSBURY, N.J. 07702
(732) 345-8445

Counsel for Respondent,
Family Options

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

35 pp

CORPORATE DISCLOSURE

Respondent Family Options is not a publicly traded company nor does it have any parent or subsidiary companies.

TABLE OF CONTENTS

CORPORATE DISCLOSURE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Credibility of Witnesses 1

B. Findings of Fact 1

C. Petitioner's Voluntary Surrender Of Her Parental Rights Complied With The Requirements Of TheNew Jersey Adoption Act 7

ARGUMENT 11

A. The Standards Of DueProcess Are Not Applicable To This Case Because The Voluntariness Of Pettioner's Waiver Of A Fundamental Right Was Not The Issue Before The Trial Court 11

B. The Trial Court Imposed The Proper Burden Of Proof Upon The Proper Party 17

C. New Jersey's Adoption Statue Is Not Unconstitutional 20

D. There Is Not A Conflict Between New Jersey And Other States Concerning The Standard Of Proof In Non State Agency Waiver Cases 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Clark v. Jeter,
486 U.S. 456 (1988) 17

Flagg Bros., Inc., v. Brooks,
426 U.S. 149, 164 (1978) 13

Johnson v. Zerbst,
304 U.S. 458 (1938) 15,16

In the Matter of the Adoption of Children by D.,
61 N.J. 89 (1972) 12, 23

In the Matter of a Female Child,
938 P.2d 1184 (HI 1997) 26

In the Matter of K.A.S.,
499 N.W. 558 (N.D. 1993) 14

In Re Baby M.,
109 N.J. 396 (1988) 8, 9, 21, 22

In re Children by N.M.
96 N.J. Super. 415 (1967) 23

In re Jay R.,
150 Cal. App.3d 251 (1983) 14

In re J.J.P.,
175 N.J. Super. 420 (App. Div. 1980) 23

Meza v. Rodriguez,
305 Ill.App.3d 777 (1999) 25

New Jersey DYFS v. A.W. and R.W.,
103 N.J. 591 (1986) 12

O.A.H. v. R.L.A.,
712 S. 2d 4 (Fla 1998) 14

Parham v. J.R.,
442 U.S. 584, 614 (1979) 15

Pickett v. Brown,
462 U.S. 1 (1983) 17

Santosky v. Kramer,
455 U.S. 745 (1982) 18, 19, 26

William D.A., Sr. v. Shawna Renee A.,
1999 N.L. 1188850 (W.Va.) 22, 24

Zablocki v. Redhail,
434 U.S. 374 (1978) 21

New Jersey Statutes

N.J.S.A. 9:3-39.1(b) 8
N.J.S.A. 9:3-41(a) 7

New Jersey Regulations

N.J.A.C. 10:121A et seq 9
N.J.A.C. 10:121A-5.4(c)(1) 8, 10

STATEMENT OF THE CASE

Petitioner's inaccuracies and misstatements of fact are unsupported by the credible evidence, the opinion of the Trial Court and the opinion of the Appellate Division. Accordingly, Respondent offers the following as an accurate account of the facts in this case.

A. CREDIBILITY OF WITNESSES

The Trial Court was in a position to assess the credibility of the witnesses who testified. Of the four major fact witnesses, Petitioner, Petitioner's mother, Ms. Christine Letizia, and Ms. Diane Propert, the Court found all to be "personally and heavily invested in the outcome of the case". Petitioner's Appendix, hereinafter referred to as "PA" 39a. In light of this, the Trial Court did not adhere to any one witness' recollection of the facts. Rather, the Trial Court "considered the parties' testimony, their biases and the consistency of their testimony, as well as how their testimony squared with known objective facts". PA 40a. After carefully weighing and considering the testimony of each, the Trial Court found Petitioner's claim that she signed the surrender and consent to adoption documents without reading any of them to be "incredible". PA 75a-76a. The Appellate Division, while acknowledging general deference to a lower court's findings of fact, determined that the Trial Court's "findings on this point appear to be eminently supported by the record". PA 10a. Accordingly, Petitioner lacked credibility with the Trial Court.

B. FINDINGS OF FACT

Petitioner was not suffering from a mental illness or psychological malady that would inhibit her from being able

to make an informed and voluntary decision to place her baby for adoption. Petitioner's family physician never diagnosed her as being depressed or in need of psychological counseling. PA 46a. The professionals at the hospital where Petitioner gave birth did not diagnose any psychological disorder in Petitioner, pre-existing or precipitated by the pregnancy, nor did they see a need to order psychological counseling for her. PA 7a; PA 55a.

Petitioner relies heavily upon portions of the testimony of a nurse, Gerry McKnight-Luddy, in supporting her depression allegation. Nurse McKnight-Luddy is a fact witness with very limited exposure to the entire matter. Petitioner conveniently overlooks other portions of Nurse McKnight-Luddy's testimony that bear upon these issues. Nurse McKnight-Luddy testified that after the delivery, Petitioner's demeanor changed from crying jags into a much calmer state. T4:190-11 to 16[1]. Another nurse, Larissa Minchin, Petitioner's attending nurse on the day after delivery, testified that Petitioner was calm during her shift. Nurse Minchin also testified that, during a conversation, Petitioner informed Nurse Minchin that she would be unable to give the baby what she needs and that she would proceed with the adoption for the sake of the baby. T4:208-1 to 5; T4:208-11 to 13.

Petitioner, though feeling the effects of the momentous decision she made, exercised her own will, free from any psychological malady, from the time she learned of her pregnancy to the time that she knowingly and voluntarily signed the surrender and consent to adoption. This was a

[1] T4:190-11 to 16 refers to the Trial Court transcript lodged with the Appellate Division of the Superior Court of New Jersey.

choice that she made after carefully and thoughtfully considering her options. After the birth of the baby, Petitioner exercised strong decisiveness when she dismissed the first couple she had approved to adopt her baby. PA 56a. Additionally, Petitioner returned to work and school immediately after giving birth. PA 89a.

Regarding Petitioner's inclinations toward parenting or lack thereof, the Trial Court, as fact finder, concluded that "while [Petitioner] complains that the agency was primarily focused on adoption, [Petitioner's] doctor referred her to the agency for that purpose, and for the first five weeks of the relationship, [Petitioner] expressed no interest whatsoever in parenting". PA 83a.

Petitioner's so-called attempt to develop a parenting plan was pursued with little vigor by Petitioner. As the Trial Court found, Petitioner understood that she could call upon a baby-sitter or try foster care or simply bring the baby home if parenting was a serious consideration. PA 83a. Petitioner testified that she was aware she could take the baby home with her at any time. T2:191-22 to 192-1. The Trial Court also noted that "[Petitioner] made it very clear that she was not willing, even for a short period of time, to put off her personal school goals and parent the child herself". PA 92a-93a. Further, the Appellate Division found that "[Petitioner] was considering parenting [the baby], but no real preparations were undertaken and no family members were available to assist with parenting...and [Petitioner] continued to consider prospective adopting parents". PA 4a. Parenting was an option that was explored. It was simply not the option the Petitioner chose.

Petitioner claims that Respondent Family Options subjected her to immense pressure to move forward with

adoption. As both the Trial Court and Appellate Court found, "the pressure by [Family Options] was not to force an adoption, but rather, to pressure [Petitioner] into making a decision about her child's future". PA 8a; PA 91a-92a. Further, even though Petitioner was at times "confused... and conflicted", she was not under "overwhelming pressure... sufficient to force her to make a decision that she would not otherwise have made". PA 8a-9a.

Petitioner made a choice to voluntarily relinquish her parental rights to her baby. It was an informed decision, as Petitioner had the benefit of knowing and understanding that she had other options to adoption. Petitioner testified at trial that it was after placing the baby with the adoptive parents that she felt the placement was a "mistake". T2:211-13 to 20. Simply stated, Petitioner is now unhappy with her choice.

Petitioner is wholly inaccurate in stating that Ms. Letizia informed Petitioner that daycare for newborns did not exist. The Trial Court found that, while Ms. Letizia was unfamiliar with the availability of daycare for newborn infants in the county where Petitioner resides and stated such, she verbally referred Petitioner to that county's Office of the Department of Youth and Family Services and the Board of Social Services. PA 80a-82a; T7:92-15 to T7:93-8. Petitioner's mother, on her own initiative, checked the local telephone directory and was unable to locate daycare for newborns in their area. T2:188-6 to 20. Additionally, Petitioner was aware that babysitting was another option. PA 82a; T4:53-16 to 21.

Petitioner is inaccurate in her depiction of Family Options' actions in continuing to care for the baby as a "defiant refusal" to abide by Petitioner's wishes. Petitioner's

Brief, hereinafter referred to as "PB", 9. Petitioner had been informed that Family Options could only provide short term foster care when a birth mother was in the process of selecting adoptive parents. T7:132-13 to 19; T7:132-23 to 25; T7:133-1 to 3. Ms. Propert cared for the baby from the time the child was released from the hospital. Ms. Letizia offered to inquire about longer term foster care for the baby. T7: 125-2 to 5. Ms. Letizia found a foster care provider and provided the information to Petitioner. T7:133-23 to 25; T7:134-11 to 13; T7:135-13 to 17; T7:136-3 to 7. Ms. Letizia was in the process of arranging to transfer the baby from Family Options' care and into longer term foster care when she was informed by Ms. Propert that Ms. Propert would continue to care for the baby because of the baby's minor medical problems and because the selection process appeared to be moving forward. T7:144-6 to 25. Neither Petitioner nor her mother objected to allowing Ms. Propert to continue to care for the baby. T7:145-17 to T7:146-2. Petitioner even felt relieved and that it was nice of Ms. Propert to continue to provide care for the baby. T2:151-6 to 19; T2:152-1 to 4.

Petitioner provides no support or citation for her contention that Ms. Letizia's "loyalty" was to the adoptive parents. A fair reading of the record shows that Ms. Letizia normally receives a flat fee if an adoption occurs. T8:232-16 to 25; T8:233-1 to 11; T8:234-5 to 7. In the event that adoptive parents have been selected, and an adoption does not occur, Ms. Letizia receives remuneration based upon an hourly rate, and, in this particular case, earned less by proceeding with the adoption. T10:152-1 to 25; T10:153-1 to 2. Petitioner's insinuation that Ms. Letizia compromised her professional ethics in order to "force" an adoption is unsupported by the facts, inflammatory, and misleading.

Additionally, Petitioner has failed to support her contention that Family Options failed to comply with the Adoption Act by not exercising its discretion to invalidate Petitioner's surrender. Moreover, as the Appellate Division found, "[t]here was no evidence that the child had bonded with [Petitioner] or would suffer harm by the adoption". PA 14a.

Petitioner is inaccurate in her allegation that Family Options contacted her on a relentless and uninvited basis. While Ms. Letizia may have placed telephone calls to Petitioner, Petitioner certainly called Ms. Letizia's beeper number with even greater regularity. Petitioner testified that she paged Ms. Letizia on no less than eleven different days from her home and twice on one of those dates: December 12, 13, 21, 27, 1999, and January 6, 10, 16, 18, 19, 20, 2000. T:124-15 to 25; T12:12-6 to 11. While Petitioner and Ms. Letizia spoke often, it was never an event solely initiated by Ms. Letizia.

Petitioner refers to Ms. Letizia's casenotes in a misleading fashion in an attempt to create a conflict between the credible record and the Trial Court's findings. As Ms. Letizia testified, the casenotes generally contained the date, nature, and a few notations regarding the contact with Petitioner. T7:16-7 to 11. Ms. Letizia testified that not every aspect of the contact was contained therein, so they were not inclusive of every part of the discussion. T7:16-12 to 14. While the casenotes are credible evidence, Petitioner's reliance upon them is inappropriate. The appropriate fashion in which to review the casenotes is that same reinforce the credibility of Ms. Letizia's testimony, since she, at the time of the occurrence, had made over fifty-one pages of notes that greatly enhanced her ability to recall. No other witness enjoyed this benefit. Thus, the casenotes actually support Ms.

Letizia's testimony and the Trial Court's findings of fact.

Petitioner is inaccurate in her allegation that, prior to Petitioner signing the surrender and consent to adoption documents, Family Options informed the adoptive parents that they were going to receive the baby. As the Trial Court found, Ms. Letizia "indicated to the [adoptive parents] that they were the finalists and she thought [Petitioner] would sign the surrender [on January 19, 2000]". PA 66a. However, the adoptive parents were fully aware that Petitioner might change her mind and not sign the documents. PA 66a.

C. PETITIONER'S VOLUNTARY SURRENDER OF HER PARENTAL RIGHTS COMPLIED WITH THE REQUIREMENTS OF THE NEW JERSEY ADOPTION ACT.

New Jersey's Adoption Act requires an approved adoption agency to provide certain information to a birthparent prior to acceptance of executed surrender documents. Pursuant to N.J.S.A. 9:3-41(a), the adoption agency must:

> Inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and the child... and consent by the person to adoption of the child.

Both the Trial Court and Appellate Division found ample credible evidence regarding Petitioner's understanding that signing the surrender documents would mean an irrevocable surrender of her parental rights and an end to her

relationship and contact with her baby, except as permitted by the adoptive parents. PA 74a; PA 10a-11a.

Pursuant to N.J.S.A. 9:3-39.1(b), "[t]he birth parent... shall be offered counseling as to his or her options other than placement of the child for adoption". The statutory requirement of options counseling is expanded upon by the regulations contained in N.J.A.C. 10:121A-5.4(c)(1), which direct the adoption agency to document that the birthparent was:

> 1. Provided at least three face-to-face counseling sessions... and that the birth parents were:
>
> i. Offered counseling that fully explores alternative plans for the child, including... temporary foster care, day dare and care by relatives;...
>
> iii. Prepared along with [the] child, for surrender and separation;
>
> iv. Referred to other community resources when the agency cannot provide needed services...

The New Jersey Supreme Court has reviewed the issue of compliance with the counseling requirements of New Jersey's Adoption Act. In the case of In Re Baby M., 109 N.J. 396, 432, (1988), the New Jersey Supreme Court determined that "the Legislature so carefully circumscribed all aspects of a consent to surrender custody --its form and substance, its manner of execution, and the agency or

agencies to which it may be made -- in order to provide the basis for irrevocability".

Further, the New Jersey Supreme Court found that the legislative purpose of the Act is furthered by the regulations in the Adoption Manual, N.J.A.C. 10:121A, et seq., by increasing the likelihood that a birthparent "fully understand[s] and appreciate[s] the consequences" of voluntarily surrendering parental rights to the child. Baby M. at 423-33. Both the Trial Court and Appellate Division in this case adhered to that rationale. PA 79a-80a; PA 12a.

In an exhaustive Opinion, the Trial Court determined that Petitioner was provided with sufficient counseling to appreciate the options available to her other than adoption and to understand the consequences of choosing adoption. PA 77a-85a. Petitioner and her mother both testified that they understood the permanency of choosing adoption. T6:69-1 to 6; T3:193-12 to 16. The credible evidence supported the Trial Court's findings, and the Appellate Division affirmed. PA 13a-14a.

The Adoption Act does not require licensed agencies to counsel birthmothers on adoption as a "last resort". It does require agencies to counsel birthmothers on the options available other than adoption, counseling which Petitioner received in full from Family Options.

Both Petitioner and her mother were aware that until the surrender and consent to adoption documents were signed, the baby was still legally Petitioner's daughter. Nurse McKnight-Luddy testified that, while in the hospital, Petitioner's mother informed Petitioner and Nurse McKnight-Luddy that nothing was signed and Petitioner did not have to "do anything" she did not want to do. T4:173-13 to 21;

T4:177-19 to 25; T4:178-1 to 19. Petitioner admitted that she was aware at the time of signing that the documents were for surrender and her consent to adoption of the baby. T3:66-8 to 25; T3:132-20 to 22.

Pursuant to the requirements of N.J.A.C. 10:121A-5.4(c)(1), Petitioner received at least three face-to-face counseling sessions in which alternatives to adoption were discussed. On each of the days that Ms. Letizia provided counseling to Petitioner, they discussed options, including foster care, day care, and care by relatives. Ms. Letizia provided Petitioner with two counseling sessions in her home, on December 11, 1999, and January 14. PA 48a-50a; T7:37-1 to T7:50-25; T7:111-8 to 25; T7:112-1 to 18. She provided four counseling sessions for Petitioner at the office of Family Options, on December 27, 1999, and January 15, 16, 19, 2000. PA 52a-53a; PA 57a-60a; PA 63a-66a; T7:69-9 to 14; T7:73-6 to 25; T7:74-1 to 10; T7:124-9 to 23; T7:125-2 to 5; T7:143-12 to 25; T7:162-8 to 23; T7:165-20 to 25. Additionally, Ms. Letizia provided counseling to Petitioner on January 12, 2000, in the hospital, and on January 18, 2000, at a diner, a location chosen by Petitioner. PA 54a-55a; PA 62a; T7:92-2 through T7:95-1 to 4; T7:154-5 to 17. This is in addition to the counseling provided by Ms. Propert, the Director of Family Options.

Additionally, Petitioner was provided with referrals to outside resources when Family Options was unable to provide the resource. Pursuant to N.J.A.C. 10:121A-5.4 et seq., Family Options was not required to contact resources directly on behalf of the Petitioner. The regulation only requires the adoption agency to refer the birthparent to an outside resource, which was the precise course of action taken by Family Options. PA 81a.

Family Options complied with the statutes and regulations governing adoptions in New Jersey by informing and counseling Petitioner so that she had knowledge and understanding of the consequences of signing the surrender documents. She was aware of the alternatives to adoption. She was aware of the finality of adoption. Family Options was in full compliance with the legislative purpose and goals of the Adoption Act. PA 14a; PA 82a-83a.

ARGUMENT

A. THE STANDARDS OF DUE PROCESS ARE NOT APPLICABLE TO THIS CASE BECAUSE THE VOLUNTARINESS OF PETITIONER'S WAIVER OF A FUNDAMENTAL RIGHT WAS NOT THE ISSUE BEFORE THE TRIAL COURT

Petitioner's brief focuses upon the claim that the right to bear and raise one's child is a fundamental right. However, Petitioner incorrectly focuses on cases where a state agency attempts to take away one's fundamental rights, thus giving rise to the due process clause of the Fourteenth Amendment. Petitioner states "The Fourteenth Amendment concept of substantive due process protects the mother's relationship with her child from *unwarranted governmental intrusion*". (emphasis added) PB 19. In this case, there was no unwarranted governmental intrusion since there was no state action or attempt by any state agency to take away Petitioner's right to raise her child. To the contrary, Petitioner voluntarily surrendered her right to raise her child. Accordingly, this case does not involve a question of substantive due process. The Trial Court's focus was not

upon the involuntary termination of Petitioner's rights, but upon whether or not the voluntary surrender of her child was made under duress.

Petitioner cites the case of In the Matter of The Adoption of Children by D., 61 N.J. 89 (1972), in support of the proposition that adoption proceedings involve the termination of the fundamental, constitutionally protected rights of the natural mother of the child, and without which there can be no adoption. While this is a true statement of the law, it must be noted that Petitioner voluntarily terminated her own rights as the natural mother of the child. The case of D. involved an adoption by a stepfather and a non-consenting birth father. That case and its standards are solely applicable to a situation with divorced parents, as the Court stated in its opinion. Accordingly, that holding is inapplicable to the case at bar.

Petitioner cites the case of New Jersey DYFS v. A.W. and R.W., 103 N.J. 591 (1986), for the proposition that the termination of a mother's fundamental interest in her relationship with her child is protected by the due process clause of the Fourteenth Amendment. That case, however, involved an involuntary termination of parental rights that was initiated by DYFS. In that instance, the Court held that the appropriate standard of proof was clear and convincing evidence, citing the Fourteenth Amendment and the need for due process. The Court did not state that this standard applied in an agency adoption or in the case where a birth mother seeks to set aside a surrender based upon a claim of duress. Accordingly, the case of DYFS v. A.W., is not controlling in this matter.

To advance her argument, the Petitioner continues to insist that state action was involved because the adoption

agency is deputized by the state, which would make the adoption agency's conduct state action. The creation of adoption though a licensed agency serves the interests of people unable to conceive children and parents who conceive children, but do not have the ability to raise them. The Legislature authorizes adoption through licensed agencies, but that does not make an adoption agency a state actor. The adoption agency's actions are subject to a review by the Court to examine if the agency complied with the relevant statutes and regulations. In this case, Family Options' actions were examined by the Trial Court and found to be in compliance with the relevant statutes.

A state is not responsible for the actions of a private party unless the law of the state has compelled the action. The Supreme Court "has never held that a State's mere acquiescence in a private action converts that action into that of the State." Flagg Bros., Inc. vs. Brooks, 426 U.S. 149, 164 (1978).

The difference between the cases cited and the instant case is clear. The case at bar did not involve any state process or state official. The state did not force Petitioner to sign the surrender and then deny the Petitioner her Constitutional rights. Petitioner availed herself of the adoption statute and initiated the action to voluntarily surrender her rights. There can be no state action since there was no government agency. Even if the Courts were to imply that the actions of the agency were state action, the process was initiated by Petitioner, not the adoption agency. There was also no deprivation of any right by the adoption agency as it was a voluntary choice of Petitioner to deprive herself of her right to raise her child.

The Petitioner argues that even if the litigation is between private parties, only the judiciary has the power to terminate parental rights. In support of this proposition, the Petitioner cites several cases, (none of which are New Jersey cases), which are easily distinguishable from this case. First, O.A.H. v. R.L.A., 712 S. 2d 4 (Fla. 1998) (improperly cited by Petitioner as G.A.H.) involved a contested adoption proceeding between the stepparent and the natural father, who would not consent. In that particular case, the father was indigent and had a right to appointed counsel, given the state involvement in an involuntary termination of parental rights. In this case, the Trial Court did not make a judicial determination of termination of parental rights and therefore no state action was implicated.

Petitioner also relies upon the case of In re Jay R., 150 Cal.App.3d 251 (1983), which also involved a stepparent adoption where it was alleged that the birth father had neglected his child. The birth father was indigent. The Court ruled that he had a right to counsel. Due process concerns were implicated because the birth father was accused of neglect, and issues of adequate notice and an opportunity to be heard were presented. That case also turned on very specific language contained in the California statutes. The Court held that "due process requires appointment of counsel for indigent noncustodial parents accused of neglect in stepparent adoption proceedings." Id. at 260. That case is more akin to the procedures necessary in an involuntary termination case initiated by the Division of Youth and Family Services since the basis of the action concerns the neglect or abuse of the child. Those facts are strikingly absent in this case. See also In the Matter of K.A.S., 499 N.W. 558 (N.D. 1993).

Petitioner has created a true distortion of the issues before the Trial Court by arguing that the Trial Court had to decide if a constitutional waiver was validly made in order to terminate the mother's rights. The Trial Court did not consider constitutional waivers and termination of the mother's rights. The issue was whether or not the Petitioner's consent to the adoption was the result of duress. "[E]xtravagant characterizations are no substitute for careful analysis." Parham v. J.R., 442 U.S. 584, 614 (1979). This case cannot be compared to an involuntary termination case. Petitioner has confused the issue which was decided at the Trial Court and attempts to use standards that are limited to involuntary termination cases. The two types of proceedings are inherently dissimilar.

The Petitioner further argues that her waiver of her fundamental right to parent her child was not voluntary, informed and knowing. The Trial Court specifically found that the Petitioner knew what she was doing when she signed the surrender document. Additionally, the waiver arguments advanced by the Petitioner apply to different types of actions, particularly when the state is involved, a fact which is absent in the present case.

Petitioner attacks New Jersey's statutory scheme as violative of due process and incorrectly states that the "state's statutory scheme makes a waiver of the mother's right totally irrevocable". The adoption statute does not mention waivers of rights, but states that a "surrender" is deemed irrevocable and yet provides that it may be set aside under certain circumstances. The Legislature certainly contemplated the importance of finality in an adoption.

In support of this ill-conceived position regarding involuntary waivers of rights, Petitioner cites Johnson v.

Zerbst, 304 U.S. 458 (1938), for the proposition that an uninformed or involuntary waiver of a fundamental right and interest is constitutionally deficient. However, Johnson is totally irrelevant and inapplicable to the case at bar. That case dealt with the Sixth Amendment right to counsel. The flaw in Petitioner's argument is that the case at bar does not involve a waiver of a fundamental right, but involves the signing of a voluntary surrender. While the Courts do not presume acquiescence in the loss of fundamental rights, the Court cannot overlook the fact that Petitioner signed a voluntary surrender of her rights to her child. This was done so after counseling and numerous discussions with the adoption agency and family members.

Petitioner argues that "it is incumbent upon the court to insure that no abuses were employed to induce the waiver of rights." PB 22. Although waiver of rights was not the issue, it is clear that the Trial Court made specific findings of fact and was assured that no abuses were employed in the taking of the surrender.

Petitioner incorrectly states that the Trial Court did not consider her attempted revocation as evidence of the involuntary nature of the surrender. PB 22. To the contrary, the Court considered all of the evidence over thirteen days of trial and wrote a fifty-seven (57) page opinion. In the Opinion, the Trial Court also thoroughly analyzed the method in which the surrender was obtained and determined that it was proper. PB 73a-94a. Petitioner argues that the irrevocability of the surrender violates her substantive due process rights. However, as discussed infra, the Petitioner is not entitled to substantive due process in the absence of state action.

Further, the Petitioner argues that rigid time frames imposed upon an unwed mother are unconstitutional. The cases cited in support thereof are taken completely out of context. Clark v. Jeter, 486 U.S. 456 (1988), is a case about the statute of limitations for paternity actions of illegitimate children. The statute was held unconstitutional on equal protection grounds. The concerns inherent in that case do not abide in this case. The time frame referred to was "the period for obtaining support" Id., at 462, not the period within which to invalidate a voluntary surrender of a child. Pickett v. Brown, 462 U.S. 1 (1983) concerned the very same issue.

While it is acknowledged that the Petitioner was faced with a difficult, emotional decision, the Trial Court included this issue in its findings of fact and found that the Petitioner had adequate time and resources to consider her decision. PA 92a-93a.

B. THE TRIAL COURT IMPOSED THE PROPER BURDEN OF ROOF UPON THE PROPER PARTY

At trial, the Court imposed the burden of persuasion upon the birth mother and ruled that she had to prove her case by a preponderance of the evidence. It is this standard that the Petitioner alleges as a violation of due process.

Petitioner disputes the Trial Court's first stated reason for its refusal to utilize a higher burden of proof, i.e., that in voluntary agency adoptions, the existence of documents, regulations, and strict standards make it more difficult to fabricate facts. However, the Trial Court did not solely rely upon the above items. The Trial Court took testimony for thirteen days, thus fulfilling its role as "the diligent and

jealous arbiter of facts" PB 21. Based upon all of the testimony and the documentary evidence submitted, the Court determined that the Petitioner understood what she was doing, was informed of the finality of the surrender, and voluntarily signed it. Evidence that the Petitioner's surrender was uninformed or involuntary is absent from the record.

Despite the review by the Appellate Division of New Jersey, Petitioner continues to argue that Family Options, the adoption agency, was the proponent of the termination and therefore should have been required to prove the basis for the termination. In fact, the proponent of the termination was the Petitioner herself. She signed a surrender to her child and agreed to terminate her parental rights. As the proponent of the original termination, it was her burden to prove that her consent was induced by duress. She was unable to meet this burden.

Nevertheless, the Petitioner argues that "simple justice" requires the agency to bear the burden of proof. PB 22. It is interesting that the Petitioner does not cite to any case or statute to support this proposition. There appears to be no case law at all that requires the agency to sustain the burden of proof when a consent is sought to be set aside by the birth parent. The agency did not take advantage of the Petitioner. The Petitioner sought the aid of the agency in her time of crisis. It was her allegation that she was under duress, thus it was appropriate for her to bear the burden of proof, not as to why her rights should not be terminated, but as to why her surrender should be set aside. Again, the Petitioner misrepresents the issue.

The Petitioner relies upon the case of Santosky v. Kramer, 455 U.S. 745 (1982) for her argument that the Trial Court should have applied a clear and convincing standard.

Santosky was a case involving an involuntary termination of parental rights initiated by the state. The Court held that the proponent of the termination had to prove its case by clear and convincing evidence. Because the state initiated the action, due process standards applied. In this case, the only question was whether or not the voluntary surrender of Petitioner was the result of duress. There was no state agency involved and there was no state action. The facts of the present case are completely dissimilar than Santosky, which is why the Santosky standards were not applied either by the Trial Court or the Appellate Division. In fact, the Trial Court noted the Santosky standard and specifically held that it was inapplicable to this case. PA 37a. Further, the Appellate Division agreed. PA 20a.

Another factor that the Santosky Court relied upon was that state resources often greatly exceed those of the parents whose rights are sought to be terminated in involuntary termination proceedings. This factor is not applicable to the instant case as state resources are not involved. Both Petitioner and Respondents have private counsel and are utilizing adequate resources to pursue the case, obviating the need for a higher standard of proof.

The case at bar was not initiated by the state, but rather by Petitioner herself. She surrendered her parental rights in a voluntary fashion and was not forced to do so by the state or anyone. Since Petitioner brought the action, it is only reasonable that she bear the burden of persuasion.

Despite the obvious inapplicability of Santosky to a case where there is a voluntary surrender to an agency, Petitioner insists that this creates an issue of constitutional significance for this Court to decide. Petitioner also urges that the burden must shift to the agency to prove the voluntary

nature of a surrender. Both of these claims are unsupported by law or fact.

C. NEW JERSEY'S ADOPTION STATUTE IS NOT UNCONSTITUTIONAL

In the state of New Jersey, there is a statutory scheme for adoption which includes adoptions through state-licensed agencies, and the consents of birth parents to the surrender and adoption of their children. The statute specifically provides that the surrender is irrevocable, absent a showing of fraud, duress or misrepresentation. While the statutes provide procedures for termination of parental rights when initiated by the state in neglect or abuse cases, such procedures are inherently different than those employed for agency adoptions.

Petitioner compares the various methods employed by statute to terminate a parent's rights and focuses on notice. In an agency adoption, the New Jersey adoption statute does not require notice of the complaint for adoption to be served upon the birth mother because when she signs the surrender and consent for adoption documents, she waives the right to be served notice of the adoption complaint.

Petitioner also attempts to compare private placement adoptions and licensed agency adoptions. A birthmother in a private placement adoption may not sign a written waiver of her parental rights because none of the safeguards inherent in an agency adoption are present. With an agency adoption, the agency must fulfill all of the aforementioned statutory and regulatory requirements in order to accept a written waiver of parental rights, which is why the surrender is deemed

irrevocable.

New Jersey has achieved a statutory and regulatory scheme for adoption that seeks to ensure and appropriately balance the rights of the child, the birthparents and the adoptive parents. The Petitioner argues that the New Jersey adoption statute which makes the revocation of a waiver irrevocable regardless of the best interests of the child is unconstitutional and violates due process as applied to this case.

Petitioner has argued that since the adoption statute impairs or adversely affects a fundamental li)erty interest, the law is subject to strict scrutiny. The Petitioner cites the case of Zablocki v. Redhail, 434 U.S. 374 (1978), for this proposition. That case concerned the fundamental right to marry, and a statute was invalidated based upon an equal protection argument. Since Petitioner has not alleged any violation of equal protection or that she is a member of a protected class, the statute in question is not subject to strict scrutiny.

In Baby M., the Court examined the statutory scheme of New Jersey's Adoption Act. The Court in Baby M. found that the "Legislature ...carefully, ...consistently, and ...substantially restricted termination of parental rights", for the reasons previously discussed. Baby M. at 429.

The Petitioner further argues that the state can achieve its objective by less intrusive means, such as imposing a period of revocation or judicial review before a surrender is signed. Deference to the Legislature in this regard is certainly appropriate, especially because the statute in question already protects birth mothers by providing a means to set aside a surrender. The Petitioner availed herself of her

statutory right and had the opportunity to prove her case. She was unable to sustain her burden. See William D.A., Sr. v. Shawna Renee A., 1999 N.L. 1188850 (W.Va.) (concurring opinion).

Since the Court in Baby M. has already closely examined the requirements of an agency surrender and found that the requirements for same are stringent and circumscribed, the Petitioner therefore has no basis to attack the statutory scheme. The Trial Court fully examined the validity of the surrender in the context of the statutory requirements and found that same was not the product of duress. The Trial Court's findings were adequately supported by the weight of the evidence. Petitioner's constitutional claims upon the statutory scheme are therefore without merit.

As a further attack on the statutory scheme, Petitioner notes the absence of a best interests analysis. The Petitioner misreads the Trial Court opinion by stating that the best interest of the child is the interest sought to be protected by the irrevocability of the surrender. The Trial Court's statement was that the "adoptive parent's right to finality of the adoption flows from the best interests of the child." PA 36a. Therefore, it is the child's best interests that favor finality of adoption.

Petitioner further misleads this Court with its statement that the lower court stated that "the child's best interest is a competing interest with that of the mother." PB 23. At the Trial Court level, the only mention of the child's best interests was when the Court outlined the exceptions to the general allocation of burden rules, one being public policy. The Court concluded that along with a right to parent, there is also a consideration of the best interests of the child, "embodied in a policy favoring the finality of adoption." The Court then

concluded that policy considerations did not determine the issue. The Court never embarked upon a best interests analysis because it was not required to do so.

The Petitioner argues that the Court had to consider the best interests of the child when making its determination. New Jersey case law dictates a contrary result as that determination is only made once there is a finding that the parental rights are terminated.

Petitioner's reliance upon several cases that involve stepparent adoptions is completely misguided. Specifically, In re Children by D., 61 N.J. 89 (1972), concerned the adoption of a child by a step father, which was objected to by the birth father. The Court specifically distinguished that case from a typical adoption, stating that "[I]t is to be stressed that what we have to say relates principally to a divorced parents situation." Id. at 92. The Court determined that the birth father's rights could only be terminated upon a finding that he willfully and continuously neglected the child or failed to perform the duties of care and support for the child. Id. at 94. The Court specifically emphasized "that the best interests of the child cannot validly ground a judgment of adoption without it first having been determined that the parental rights of the non-consenting parent can and should be terminated." Id. at 95. See also In Re J.J.P., 175 N.J. Super. 420 (1980); In re Children by N.M., 96 N.J. Super. 415 (1967) (stepparent adoption cases).

D. THERE IS NOT A CONFLICT BETWEEN NEW JERSEY AND OTHER STATES CONCERNING THE STANDARD OF PROOF IN NON STATE AGENCY WAIVER CASES

The Petitioner alleges a conflict between New Jersey Courts and three other states concerning the burden of proof when a birth mother voluntarily waives her rights. Interestingly enough, the Petitioner relies upon case law in three other states which imposed a clear and convincing standard when the basis for the termination was a voluntary waiver. The Petitioner fails to state that in all three cases, the birth parent had the burden of persuasion to prove that the surrender was not voluntary. If this Court determined that the clear and convincing standard applied according to those three cases, the Petitioner would still be unable to meet her burden since she was unable to meet a lower burden of proof, i.e., a preponderance of the evidence.

Nevertheless, these cases are instructive to the finding of duress in other jurisdictions and actually further support the opinion of the Trial Court. In the case of William D.A., Sr., v. Shawna Renee A., 1999 N.L. 1188850 (W. Va.), the birth mother alleged that she was subject to the duress of her father-in-law when she signed a consent to adoption. The court had a trial and determined that the birth mother understood all of the words in the consent and that her credibility was low. The Court found that more than "duress of circumstance'' was required to overturn a consent to adoption. The Court also noted that "if we allowed difficulty inherent in a natural parent's circumstances to constitute duress, it would be difficult to see how any adoption based on consent could ever stand." Id. at *4.

The Court also found that the birth mother had the consent form for a period of time before signing it and had an opportunity to obtain independent advice about it. These facts are strikingly similar to those considered by the Trial Court in this case. In a footnote, the Court stated that West Virginia's adoption law requires proof of duress to be established by clear and convincing evidence by *"the person who executed the consent."* (emphasis added). The concurring opinion noted the importance of the finality of adoption. Thus, even if this Court found that case persuasive, the higher burden of proof would be placed upon the Petitioner.

In the case of Meza v. Rodriguez, 305 Ill.App.3d 777 (1999), a birth father attempted to set aside his surrender. The Illinois statute in question is very similar to the New Jersey statute. The Court held that it was the birth father's burden to prove by clear and convincing evidence that the surrender was the result of duress. The birth father argued that the Adoption Act was "unconstitutional because it invaded the judiciary's power to protect and preserve parental rights." The Act was held constitutional "because the judiciary retained the authority to determine the validity of the surrender." Id. at 783. Most notably, the court stated that:

> the Act does not deprive the natural parent of an opportunity to have a court review the voluntariness of the surrender. Indeed, this is precisely what occurred in the instant case. After Meza filed his complaint, he received a full evidentiary hearing and a court determination as to the voluntariness and validity of his surrender." Id. at 791.

Petitioner's argument is similar to Mr. Meza's and fails for the same reasons.

The state of Hawaii also has an adoption statute very similar to New Jersey. In the Matter of a Female Child, 938 P.2d 1184 (HI 1997), the Court specifically distinguished termination cases from agency adoptions.

> Moreover, withdrawal of a consent to adoption differs from situations such as when the state seeks to terminate the parent-child relationship or when a non-parent seeks custody of a child. In those situations, the appropriate inquiry is directed at the natural parent's fitness to parent...In contrast, a natural parent attempting to withdraw a consent to adoption had already given up that right by voluntarily consenting to the adoption in the first instance. Id. at 1186.

That Court also imposed the burden of proof upon the birth mother and found that it was the mother's valid consent which severed her relationship with her child.

The above cases do not mention the Santosky case and Petitioner's attempt to surmise that the Courts were compelled to employ the clear and convincing standard because of Santosky is ridiculous. Accordingly, the cases from other jurisdictions support the Trial Court's decision to place the burden of proof upon the birth mother.

CONCLUSION

Based upon the foregoing, the Court should deny the Petition for Writ of Certiorari.

Samuel L. Peluso
Counsel of Record
Peluso, Staufenberg, Castelluci & Hanula
740 Broad Street
Shrewsbury, New Jersey 07702
(732) 345-8445

Attorney for Respondent, Family Options

(4)

Supreme Court, U.S.
FILED
OCT 4 2001
OFFICE OF THE CLERK

No. 00-1924

IN THE

Supreme Court of the United States

B.J.M.,

Petitioner,

v.

FAMILY OPTIONS; E.R.B. AND P.L.B., his wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

REPLY BRIEF

HAROLD J. CASSIDY
Counsel of Record
961 Holmdel Road
Holmdel, NJ 07733
(732) 332-9300

ROBERT W. GOODMAN
50 Main Street
Hackensack, NJ 07601
(201) 488-7100

JOSEPH E. MARLEY
66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 422-1771

Attorneys for Petitioner

169806

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

15 pp

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Legal Argument 1

This Court Should Grant The Writ Of Certiorari And Decide This Case On The Merits 1

A. The Irrevocable Nature Of The Surrender Document 1

B. The Findings Of The Trial Court 5

Conclusion 6

Appendix — Adoption Statutes Of The Fifty States .. 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

In the Matter Baby M., 537 A.2d 1227 (1988) 2, 4

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 3, 4, 6

Santosky v. Kraemer, 455 U.S. 748 (1982) 3, 4, 6

Sees v. Baber, 377 A.2d 628 (1977) 2, 4

Statute:

N.J.S.A. 9:3-41(a) 3

LEGAL ARGUMENT

This Court Should Grant The Writ Of Certiorari And Decide This Case On The Merits

The arguments advanced to this Court by counsel for defendants Family Options, and E.R.B. and P.L.B., rely almost exclusively on: (1) the trial court's findings of fact which were adverse to the petitioner B.J.M. (Brief of E.R.B. and P.L.B., at P.8; P.1; brief of Family Options, P.1 to 8); and (2) the existence of the waiver document, being irrevocable under state law, disposes of the need to comply with any requirements of Due Process (Family Options, P.11-27; E.R.B. and P.L.B., P.5 to 15). These two points, taken here in reverse order, actually demonstrate why the New Jersey law violates petitioner's Due Process rights and underscore the need for this Court to grant the writ and decide the case on its merits.

A. The Irrevocable Nature Of The Surrender Document

The reality is that the termination of petitioner's rights entered by the state in this case was totally involuntary. It was entered over the objection of the petitioner, and only after she spent two weeks in trial attempting to persuade the trial court not to enter an order which would later be used as the basis to terminate her fundamental interest. It is, therefore, a misnomer to characterize this case as a "voluntary" termination.

Of course, the basis for the involuntary termination in this case is the allegation that the defendant Family Options obtained from petitioner, at a prior time, a document evidencing the petitioner's intention to voluntarily waive her fundamental constitutional right to her relationship with her child. It is asserted by defendants that the mere existence of this document, and the irrevocable nature attached to it under state law, removes all need for the state to adhere to any requirements of Due Process as the state conducts trials and hearings leading to the termination of the mother's fundamental rights. (*See*, e.g. brief Family Options, P.11 to 20)

First, as a result of the mere allegation of the existence of the document, the New Jersey Court presumes that the surrender was voluntarily obtained, all conditions for its irrevocability were met, and it constitutes a voluntary, informed, knowing waiver of the mother's constitutional rights.

That assumption subsumes factual considerations relevant to both state adoption law and federal constitutional standards applied to waiver of basic human rights.

The New Jersey Supreme Court has held that there are conditions to be met for "irrevocability" to attach to a relinquishment document taken by a licensed adoption agency.

> "These strict prerequisites to irrevocability constitute a recognition of the most serious consequences that flow from such consents: termination of parental rights, the permanent separation of parent from child, and the ultimate adoption of the child. *See Sees v. Baber, supra*, 74 *N.J.* at 217. Because of those consequences, the Legislature severely limited the circumstances under which such consent would be irrevocable. *The legislative goal is furthered by regulations requiring approved agencies, prior to accepting irrevocable consents, to provide advice and counseling to women, making it more likely that they fully understand and appreciate the consequences of their acts. N.J.A.C.* 10:121A-5.4(c)." *In the Matter of Baby M.*, 537A 1227, 1245-46 (emphasis added).

It is clear that under New Jersey law the voluntary and irrevocable nature of the waiver document depends upon the fact that all of the counseling requirements, which are designed to insure that this waiver is informed and truly voluntary, are met. Likewise, under constitutional principles the waiver can be valid only if truly informed and voluntary. (*See*, Pet.). Yet, under the procedure New Jersey provides, the mere allegation that a document exists results in the presumption that all of these requirements were met. It presumes the very facts in issue.

Second, as a result of the existence of the document the state exonerates the proponent of the termination of the mother's rights from having to produce any proofs at all. Not only is the *Santosky* standard not enforced, but no proof from the proponent is required at all in clear contravention of *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

This exposes one of the greatest Due Process violations of the New Jersey law which compels this Court to decide this case on the merits. By characterizing the document as "irrevocable" the document is really being used to circumvent the requirements of *Santosky v. Kraemer*, 455 U.S. 748 (1982) and *M.L.B. v. S.L.J.*, *supra*, because, although there is need for a trial and hearing following the execution of the document, the agency which took the document does not have to prove that it met either State law or Federal constitutional standards by any measure of proof. The burden to prove that the waiver was not voluntary or informed by either State or Federal standard is placed upon the mother whose rights the state proposes to terminate. In what can be characterized, at best, as a careless and arbitrary delegation of the state's power, the statute gives the licensed agency the broad discretion to permit revocation of the mother's waiver, without providing a single word on what criteria should be employed in the exercise of the discretion. N.J.S.A. 9:3-41(a). The agency in this case, of course, ignored the mother's pleas for the return of her child, despite the fact it was in the child's best interest. This statutory scheme must be examined by this Court on its merits.

The respondent also evidences a misunderstanding of the relevance of the fact that other states allow a period of revocation before a waiver of a mother's rights would be enforced. The relevance that petitioner assigns to the fact that about thirty states allow for the revocation of such a waiver, is not, as respondents want to suggest, that if other states "voluntarily" allow revocation, then New Jersey must also (*See*, brief of E.R.B., P. 10-13).

Rather, its relevance goes to the question of the compelling nature of the state interest that respondent asserts is promoted by making the waiver totally irrevocable. The fact that thirty other states have successfully implemented adoption statutes that allow for revocation of a waiver of the mother's rights evidences the fact that there is clearly a less intrusive means for the state to accomplish its goal to use adoption as a means to advance the best interest of the child. Obviously, the state statutory scheme must meet the standards of strict scrutiny because it involves the state's termination of the mother's fundamental rights. *Santosky v. Kraemer, supra.*

The state's interest which the adoption statute promotes is that of the best interest of the child. As petitioner noted it is not in the child's best interests to unnecessarily remove the child from the custody and care of his or her natural mother who wants to raise the child. The need for "finality" of proceedings is valid only if it advances the purpose of the statute, that of promoting the child's best interest. "Finality" is not itself the interest of the state that the statute seeks to promote, because finality can be in conflict, as in this case, with the child's best interest. The finality of the process can be achieved just as easily with a revocation provision. Likewise, the Due Process requirement that the proponent of termination be required to bear the burden of proof by clear and convincing evidence does no more injustice to the child's best interest here than in the situation found in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

It is worth pointing out that the judgement of termination isn't final until the order of adoption is entered. The trial on the fact question surrounding the validity of the mother's waiver occurs after the document is signed as well. In private placement adoptions a waiver of the mother's rights is not even recognized as a basis for termination, and the mother can obtain the return of the child after a "consent" any time up to the entry of the judgment of adoption. *Sees v. Baber*, 377 A.2d 628 (1977); *Baby M.*, 537 A.2d 1227 (1988).

The overwhelming majority of states allow a revocation of the mother's waiver of her rights, or has a judicial hearing to determine the informed voluntary nature of the waiver before it is executed, and many other states allow revocation if it is in the child's best interests. See List of state statutes in addendum to this brief. New Jersey provides for none of these safeguards.

B. The Findings Of The Trial Court

Respondents' reliance upon the findings of the trial court completely misses the point. The findings were made by the use of an incorrect standard of proof, the court placed the burden of proof on the wrong party and assumed the qualities about the waiver that the court had no right to assume.

It is clear from reading the court's findings that the trial judge had found the agency's witnesses lacked credibility in many ways. 39a to 41a. The court found that petitioner B.J.M. cried for fourteen hours after seeing her child, distressed about giving the child up, and found B.J.M. thought it was impossible for her to give up her baby. *See*, 54 a to 57a. Many of the facts found were subject to interpretation with respect to the mother's state of mind.

This is exactly the kind of case in which the burden of proof was decisive. It should be pointed out that B.J.M. had extensive visitation and the child was only a couple of months old when the court conducted the trial. The findings would have been different had the court used the proper standard of proof, especially if he applied the strict requirements for counseling of the mother to insure the informed, voluntary nature of her decision.

CONCLUSION

The individual liberty at stake in this case is one of the most important any woman possesses in all of life. The standards surrounding its termination — especially where that termination is not based upon the best interest of the child, but an alleged waiver of the mother's rights which she both contests in the first instance and seeks to revoke, whether or not there were deficiencies in the original waiver process — must be strictly enforced. This Court should grant the writ of certiorari and determine if the *Santosky* and *M.L.B.* holdings apply to states that use a waiver of the mother's rights as the grounds to terminate the mother's rights over her objection.

Respectfully submitted,

HAROLD J. CASSIDY
Counsel of Record
961 Holmdel Road
Holmdel, NJ 07733
(732) 332-9300

ROBERT W. GOODMAN
50 Main Street
Hackensack, NJ 07601
(201) 488-7100

JOSEPH E. MARLEY
66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 422-1771

Attorneys for Petitioner

APPENDIX

APPENDIX — ADOPTION STATUTES OF THE FIFTY STATES

1.	Alabama	Ala. Code §§ 26-10A-12(b) (1), (2), & (3) (2000); Alaska Stat. § 25.23.060 (a) (2000)
2.	Alaska	Alaska Court Rules: Rule 9(d) (2001)
3.	Arizona	Ariz. Rev. Stat. § 8-107 (A) (2000)
4.	Arkansas	Ark. Code. Ann. § 9-9-208 (3) (1999); Ark. Code. Ann. § 9-9-220 (1999)
5.	California	Cal. Fam. Code § 8814 (Deering 2001)
6.	Colorado	Colo. Rev. Stat. § 19-5-103 (7) (a) (I), (II), & (III) (2000)
7.	Connecticut	Con. Gen. Stat. Ann. § 45a-715 (d) (2001); Con. Gen. Stat. Ann. § 45a-717 (a) (2001)
8.	Delaware	13 Del. C. § 907 (a) (2001); 13 Del. C. § 1107 (f) (2000); 13 Del. C. § 1108 (a) (2001)
9.	Florida	Fla. Stat. § 63.082 (2001); Fla. Stat. §§ 39.801 (3) (a), & (d) (2000); Florida Rules of Court: Rule 80505 (c) (2001)
10.	Georgia	O.C.G.A. § 19-8-5 (a) (2000); O.C.G.A. § 19-8-5 (c) (2000)
11.	Hawaii	

Appendix

12. Idaho	Idaho Code § 16-2005 (e) (2000); Idaho Code § 16-2005 (g) (2000)
13. Illinois	§ 750 ILCS 50/10 (H) (2001)
14. Indiana	Burns Ind. Code Ann. § 31-35-1-8 (2000); Burns Ind. Code Ann. § 31-35-1-10 (2000)
15. Iowa	Iowa Code § 232.116 (1) (a) (2001); Iowa Code § 232.116 (3) (2001)
16. Kansas	K.S.A. § 59-2114 (a) (2000)
17. Kentucky	Ky. Rev. Stat. Ann. § 625.040 (1) (2001); Ky. Rev. Stat. Ann. § 625.041 (1) (2001); Ky. Rev. Stat. Ann. § 625.04 (5), & (6) (2001)
18. Louisiana	La. Ch. C. Art. 1121 (A) (2001); La. Ch. C. Art. 1121 (B) (2001); La. Ch. C. Art. 1195 (A) (2001)
19. Maine	18 A.M.R.S. § 9-202 (A) (2) (2000); 18 A.M.R.S. § 9-202 (B) (2) (2000)
20. Maryland	
21. Mass.	Mass. Ann. Laws ch. 210 § 2 (2001)
22. Michigan	MCL § 710.44 (1) (2001)

Appendix

23. Minn.	Minn. Stat. § 259.24 (5) (2000); Minn. Stat. § 260C.301 (5) (2000); Minn. Stat. § 260C.307 (2) (2000)
24. Miss.	Miss. Code Ann. § 93-17-5 (2001)
25. Missouri	Mo. Rev. Stat. § 453.030 (5) (2000); Mo. Rev. Stat. § 453.030 (6) (2000)
26. Montana	Mont. Code Ann. § 42-2-303 (2000)
27. Nebraska	Neb. Stat. Ann. § 43-106 (2001)
28. Nevada	Nev. Rev. Stat. Ann. §127.053 (5) (2001)
29. N.H.	N.H. Rev. Stat. Ann. § 170-B:8 (II) (2000)
30. N.J.	N.J. Stat. § 9:3-41 (a) (2001)
31. N.M.	N.M. Stat. Ann. §§ 32A-5-23 (A) (1), (2) (2001)
32. New York	NY CLS Dom. Rel. §§ 115b (2) (a) & (b) (2001); NY CLS Dom. Rel. §§ 115b (4) (a) (ii), (b) (2001)
33. N.C.	N.C. Gen. Stat. § 48-3-605 (a) (2000); N.C. Gen. Stat. §§ 48-3-605 (c) (1), (2), (3), & (4) (2000)
34. N.D.	N.D. Cent. Code § 14-15-07 (1) (c) (2001)

35.	Ohio	ORC Ann. § 3107.08 (A) (4) (Anderson 2001)
36.	Oklahoma	10 Okl. St. § 7503-2.3 (C) (2000); 10 Okl. St. § 75032.7 (G) (2000)
37.	Oregon	
38.	PA	23 Pa.C.S. § 2711 (D) (2) (2001)
39.	Rhode Island	
40.	S.C.	S.C. Code Ann. § 20-7-1705 (A) (2000)
41.	S.D.	S.D. Codified Laws § 25-5A-15 (2001); S.D. Codified Laws § 25-5A-16 (2001)
42.	Tennessee	Tenn. Code Ann. § 36-1-111 (b) (2001)
43.	Texas	Tex Fam. Code §§ 161.103 (a) (1), (2), & (3) (2000)
44.	Utah	Utah Code Ann. §§ 78-30-4.18 (1) (a), (b) (2001)
45.	Vermont	15A V.S.A. §§ 2-405 (a) (1) & (2) (2001); 15A V.S.A. §§ 2-405 (d) (1) & (2) (2001)
46.	Virginia	Va. Code Ann. § 63.1-219.39 (2001); Va. Code Ann. § 63.1-219.40 (2001)

47.	Washington	Rev. Code Wash. § 26.33.090 (1) (2001); Rev. Code Wash. § 26.33.090 (2) (2001); Rev. Code Wash. § 26.33.090 (3) (2001)
48.	W.V.	W. Va. Code § 48-4-3a (b) (2001)
49.	Wisconsin	Wis. Stat. § 48.41 (2) (a) (2000)
50.	Wyoming	Wyo. Stat. § 1-22-109 (c) (i) (2001); Wyo. Stat. § 1-22-109 (c) (ii) (2001)